No. 17-1272	
Title:	Henry Schein, Inc., et al., Petitioners v. Archer and White Sales, Inc.
Docketed:	March 12, 2018
Linked with 17A859	
Lower Ct:	United States Court of Appeals for the Fifth Circuit
Case Numbers:	(16-41674)
Decision Date:	December 21, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Feb 12 2018	Application (17A859) for a stay, submitted to Justice Alito. **Main Document** **Proof of Service**
Feb 14 2018	Response to application (17A859) requested by Justice Alito, due Wednesday, February 21, by 3 p.m. ET.
Feb 21 2018	Response to application from respondent Archer and White Sales, Inc. filed. **Main Document** **Proof of Service**
Feb 22 2018	Reply of applicant Henry Schein, Inc., et al. filed. **Reply** **Proof of Service**
Mar 02 2018	Application (17A859) referred to the Court.
Mar 02 2018	The application (17A859) for stay presented to Justice Alito and by him referred to the Court is granted, and the proceedings in the United States District Court for the Eastern District of Texas, case No. 2:12-cv-572, are stayed pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.
Mar 09 2018	Petition for a writ of certiorari filed. (Response due April 11, 2018) **Petition** **Appendix** **Certificate of Word Count** **Proof of Service**
Mar 23 2018	Motion to extend the time to file a response from April 11, 2018 to May 11, 2018, submitted to The Clerk.

	Main Document
Mar 28 2018	Motion to extend the time to file a response is granted and the time is extended to and including May 11, 2018.
May 11 2018	Brief of respondent Archer and White Sales, Inc. in opposition filed. **Main Document** **Proof of Service** **Certificate of Word Count**
May 29 2018	DISTRIBUTED for Conference of 6/14/2018.
May 29 2018	Reply of petitioners Henry Schein, Inc., et al. filed. (Distributed) **Main Document** **Proof of Service** **Certificate of Word Count**
Jun 18 2018	DISTRIBUTED for Conference of 6/21/2018.
Jun 25 2018	Petition GRANTED.
Jul 02 2018	Joint motion for an extension of time to file the opening briefs on the merits filed. **Main Document**
Jul 13 2018	Joint motion to extend the time to file opening briefs on the merits granted. The time to file the joint appendix and petitioners' brief on the merits is extended to and including August 14, 2018. The time to file respondent's brief on the merits is extended to and including September 18, 2018.
Jul 30 2018	Blanket Consent filed by Petitioners, Henry Schein, Inc., et al.. **Blanket Consent**
Aug 03 2018	Blanket Consent filed by Respondent, Archer and White Sales, Inc.. **Blanket Consent**
Aug 14 2018	Brief of petitioner Henry Schein, Inc., et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 14 2018	Joint appendix filed. **Main Document** **Proof of Service**
Aug 14 2018	Motion to file Volume II of the joint appendix under seal filed by petitioners Henry Schein, Inc., et al. **Main Document** **Proof of Service**
Aug 15 2018	Brief amicus curiae of Anthony Michael Sabino filed. **Main Document** **Proof of Service** **Certificate of Word Count**

Aug 15 2018	Amicus brief of Anthony Michael Sabino not accepted for filing. (August 20, 2018 - to be resubmitted with complete documentation.)
Aug 20 2018	SET FOR ARGUMENT on Monday, October 29, 2018
Aug 20 2018	Brief amicus curiae of New England Legal Foundation filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 21 2018	Brief amicus curiae of Atlantic Legal Foundation filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 21 2018	Brief amicus curiae of The Chamber of Commerce of the United States of America filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 22 2018	DISTRIBUTED for Conference of 9/24/2018.
Sep 10 2018	Record requested from the U.S.C.A. 5th Circuit.
Sep 12 2018	CIRCULATED
Sep 18 2018	Brief of respondent Archer and White Sales, Inc. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 25 2018	Brief amicus curiae of Public Citizen, Inc. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 25 2018	Amicus brief of George A. Bermann not accepted for filing. (Corrected brief submitted - October 03, 2018)
Sep 25 2018	Brief amicus curiae of American Association for Justice filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 25 2018	Brief amicus curiae of George A. Bermann filed. (Distributed) **Main Document** **Proof of Service** **Certificate of Word Count**
Oct 01 2018	Motion to file Volume II of the joint appendix under seal GRANTED.
Oct 15 2018	Reply of petitioners Henry Schein, Inc., et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Oct 29 2018	Argued. For petitioners: Kannon K. Shanmugam, Washington, D. C. For respondent: Daniel L. Geyser, Dallas, Tex.

Jan 08 2019	Judgment VACATED and case REMANDED. Kavanaugh, J., delivered the opinion for a unanimous Court.

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No.

In the Supreme Court of the United States

HENRY SCHEIN, INC., ET AL., PETITIONERS

v.

ARCHER AND WHITE SALES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Arbitration Act permits a court to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes the claim of arbitrability is "wholly groundless."

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Henry Schein, Inc.; Danaher Corporation; Instrumentarium Dental Inc.; Dental Equipment LLC; Kavo Dental Technologies, LLC; and Dental Imaging Technologies Corporation. Respondent is Archer and White Sales, Inc.

Henry Schein, Inc., has no parent corporation, and no publicly held company holds 10% or more of its stock.

Instrumentarium Dental Inc.; Dental Equipment LLC; Kavo Dental Technologies, LLC; and Dental Imaging Technologies Corporation are wholly owned subsidiaries of petitioner Danaher Corporation. Danaher Corporation has no parent corporation, and no publicly held company holds 10% or more of its stock.

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In the Supreme Court of the United States

No.

HENRY SCHEIN, INC., ET AL., PETITIONERS

v.

ARCHER AND WHITE SALES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Henry Schein, Inc.; Danaher Corporation; Instrumentarium Dental Inc.; Dental Equipment LLC; Kavo Dental Technologies, LLC; and Dental Imaging Technologies Corporation respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 878 F.3d 488. The district court's opinion denying petitioners' motions to compel arbitration (App., *infra*, 18a-38a) is unreported. The magistrate judge's order granting petitioners' motions (App., *infra*, 39a-44a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. 2, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT

This case presents a recognized and vitally important circuit conflict concerning the interpretation of the Federal Arbitration Act (FAA). Under the FAA, "parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 68-69 (2010). This Court has held that "[a]n agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Id.* at 70. The question presented is whether the FAA permits a court to decline to enforce an agreement delegating

questions of arbitrability to an arbitrator if the court concludes the claim of arbitrability is "wholly groundless."

Respondent is a former distributor of certain petitioners. Respondent's distributorship agreements required it to arbitrate disputes "arising under or related to" the agreements, including disputes over arbitrability. Respondent nevertheless filed a complaint in federal court, alleging that petitioners had violated federal and state antitrust laws by wrongfully restricting or terminating respondent's distributorship rights under the agreements. Petitioners moved to compel arbitration, citing the provisions in the parties' arbitration agreements delegating questions of arbitrability to an arbitrator.

The district court denied the motions to compel arbitration, and the court of appeals affirmed. The court of appeals invoked its own exception to the rule that parties may delegate questions of arbitrability to arbitrators—an exception that purportedly applies when a court analyzes the merits of the movant's arbitrability arguments and concludes they are "wholly groundless."

The court of appeals' decision exacerbates an entrenched split of authority in the federal courts of appeals on the validity of the "wholly groundless" exception. And it cannot be reconciled either with the FAA's text or with its "primary purpose": namely, to "ensure that private agreements to arbitrate are enforced according to their terms." *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) (internal quotation marks and citations omitted). As it has in many other recent cases, this Court should grant certiorari to correct the lower courts' arbitration-unfriendly interpretation of the FAA and reaffirm the "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985).

A. Background

Congress enacted the FAA almost a century ago to "reverse the longstanding judicial hostility to arbitration agreements." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Section 2 of the FAA—the Act's "primary substantive provision," *Moses H. Cone Memorial Hospital* v. *Mercury Construction*, 460 U.S. 1, 24 (1983)—guarantees that "[a] written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. Section 2 reflects "both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011).

Section 2 of the FAA requires courts to "place[] arbitration agreements on an equal footing with other contracts[] and * * * enforce them according to their terms." *Rent-A-Center*, 561 U.S. at 67. The FAA's command that courts rigorously enforce agreements to arbitrate according to their terms applies in disputes over "gateway" issues, such as whether a particular claim falls within the scope of the arbitration provision or whether a nonsignatory to the agreement is required to participate in arbitration. *Id.* at 69. And it applies to disputes over an equally important antecedent question: who decides such gateway issues, the court or the arbitrator? See *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 943-944 (1995).

Although courts, not arbitrators, presumptively resolve gateway disputes, parties may supersede that gen-

eral rule by "clearly and unmistakably" agreeing to "arbitrate arbitrability." *First Options*, 514 U.S. at 943. One way for parties to accomplish that result is by including a so-called "delegation provision" in their arbitration agreement. A delegation provision is "simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Rent-A-Center*, 561 U.S. at 70. When parties include such a provision in their arbitration agreement, the delegation of authority to the arbitrator applies to virtually all gateway disputes, including disputes over "whether their agreement covers a particular controversy." *Id.* at 68-69; see *BG Group, PLC* v. *Republic of Argentina*, 134 S. Ct. 1198, 1206 (2014).

A contract need not contain an express delegation provision to "clearly and unmistakably" delegate arbitrability questions to an arbitrator. As every court of appeals to consider the question has held, an agreement incorporating rules that themselves delegate arbitrability to the arbitrator, like the rules of the American Arbitration Association (AAA), provides the requisite clear and unmistakable delegation. See, *e.g.*, *Belnap* v. *Iasis Healthcare*, 844 F.3d 1272, 1283-1284 (10th Cir. 2017).

B. Facts And Procedural History

1. Petitioners manufacture and distribute dental equipment. During the relevant period, respondent distributed, sold, and serviced dental equipment on behalf of many different companies, including some of the petitioners. C.A. App. 18-20.

In 2012, respondent filed suit against petitioners in the United States District Court for the Eastern District of Texas, alleging violations of Section 1 of the Sherman Antitrust Act, 15 U.S.C. 1, and state antitrust law. C.A. App.

18. The complaint sought "tens of millions of dollars" in damages stemming from petitioners' alleged conspiracy to boycott respondent and to restrict respondent's sales territories under certain distribution agreements. *Id.* at 16-17, 24-30. The complaint also included a summary request for unspecified injunctive relief, stating as follows:

> Plaintiff also seeks injunctive relief. The violations set forth above are continuing and will continue unless injunctive relief is granted.

Id. at 35-36. The complaint contained no further allegations concerning the requirements for obtaining injunctive relief. Since initiating this suit, respondent has never sought any form of preliminary or other injunctive relief.

2. Petitioners moved to compel arbitration of respondent's claims. C.A. App. 68-156, 166-181; see 9 U.S.C. 4. Petitioners' motions were based on respondent's distribution agreements, which provided in relevant part:

> This Agreement shall be governed by the laws of the State of North Carolina. Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes relating to trademarks, trade secrets or other intellectual property of Pelton & Crane) shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association. The place of arbitration shall be Charlotte, North Carolina.

C.A. App. 504.

Respondent opposed petitioners' motions, claiming that the boilerplate request for injunctive relief in its complaint rendered the *entire* dispute triable to a jury rather than an arbitrator. In response, petitioners noted that, where, as here, an arbitration provision contains a carve-

out for injunctive relief, courts routinely read the exception to permit injunctive relief from a court (1) on a preliminary basis to preserve the status quo *pending* arbitration or (2) on a permanent basis *after* the plaintiff secures an arbitration award in its favor. See, *e.g.*, *Erving* v. *Virginia Squires Basketball Club*, 468 F.2d 1064, 1067 (2d Cir. 1972); *Lawrence* v. *Comprehensive Business Services Co.*, 833 F.2d 1159, 1163 (5th Cir. 1987); *Sauer-Getriebe KG* v. *White Hydraulics, Inc.*, 715 F.2d 348, 350 (7th Cir. 1983); cert denied, 464 U.S. 1070 (1984).

A magistrate judge—to whom the case had been assigned for all pretrial purposes—granted petitioners' motions to compel arbitration. App., *infra*, 39a-44a. The magistrate judge explained that, while on "the most superficial level, [respondent's] lawsuit is clearly an action seeking injunctive relief," the complaint "does not seek *only* injunctive relief, and the Court is persuaded that damages * * * are the predominant relief sought." *Id.* at 41a. The magistrate judge accordingly determined that "there is in this case a plausible construction [of the arbitration provision] calling for arbitration." *Id.* at 41a-42a. On that basis, the magistrate judge concluded that the question whether the agreements' carve-out for actions seeking injunctive relief applied to petitioners' claims "should properly be left for the arbitrator to decide." *Id.* at 42a.

3. Respondent asked the district court to reconsider the magistrate judge's order compelling arbitration. More than three years later, the district court vacated the magistrate judge's order and denied petitioners' motions to compel arbitration. App., *infra*, 18a-38a. Explicitly interpreting the "[s]cope of [the] [a]rbitration [c]lause," *id.* at 26a, the court reasoned that the agreements' exception

for "actions seeking injunctive relief" meant that respondent's inclusion of a perfunctory request for injunctive relief entitled respondent to a jury trial on the entirety of its claims. *Id.* at 27a-28a. Of particular relevance here, the court further determined that any contrary reading of the agreements' arbitration provision would be "wholly groundless." *Id.* at 34a-37a.

4. Petitioners filed an interlocutory appeal under the FAA, see 9 U.S.C. 16(a), and the court of appeals affirmed. App., *infra*, 1a-17a.

The court of appeals based its decision on its earlier holding in *Douglas* v. *Regions Bank*, 757 F.3d 460 (5th Cir. 2014), that, "[i]f an 'assertion of arbitrability [is] wholly groundless,' the court need not submit the issue of arbitrability to the arbitrator." App., *infra*, 11a (quoting *Douglas*, 757 F.3d at 463). In *Douglas*, as in this case, the court of appeals considered whether to compel arbitration based on the existence of a delegation provision in the parties' arbitration agreement. The court of appeals acknowledged that, under this Court's precedents, "[d]elegation provisions * * * normally require an arbitrator to decide in the first instance whether a dispute falls within the scope of the arbitration provision." 757 F.3d at 462. But relying on decisions from the Federal Circuit, the court of appeals purported to identify an exception to that rule where "the argument that the claim at hand is within the scope of the arbitration agreement is 'wholly groundless.'" *Id.* at 464 (citing *Qualcomm Inc.* v. *Nokia Corp.*, 466 F.3d 1366, 1371 (Fed. Cir. 2006); *Agere Systems, Inc.* v. *Samsung Electronics Co.*, 560 F.3d 337 (5th Cir. 2009)). The court of appeals adopted this test over a dissent from Judge Dennis, who contended that the

court's newfound "wholly groundless" exception "appear[ed] to be contrary to Supreme Court authority." *Ibid.* (Dennis, J., dissenting).

In this case, petitioners argued to the court of appeals that applying the "wholly groundless" standard "would allow the court to construe the bounds of [the] arbitration clause before an arbitrator can do so—effectively obviating the entire purpose of delegating the gateway question to the arbitrator in the first place." App., *infra*, 14a. But the court rejected that argument, concluding that, "if the ['wholly groundless'] doctrine is to have any teeth, it must apply where, as here, an arbitration clause expressly excludes certain types of disputes." *Id.* at 15a-16a. The court went on to determine, based on its own interpretation of "the four corners of the contract," *id.* at 16a, that there was "no plausible argument that the arbitration clause applies here to an 'action seeking injunctive relief,'" *ibid.* The court of appeals reached that conclusion despite the magistrate judge's contrary determination that "there is in this case a plausible construction [of the arbitration clause] calling for arbitration." *Id.* at 41a-42a.[1]

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[1] The court of appeals separately considered whether the parties had "clearly and unmistakably" delegated the issues of arbitrability to the arbitrator. App., *infra*, 6a-11a. Petitioners contended that, because the agreements in question expressly incorporated AAA rules, they contained the requisite delegation of arbitrability disputes. *Id.* at 8a-9a. Respondents disagreed, arguing that the agreements' incorporation of AAA rules should be interpreted as applying only to cases outside the carve-out for "actions seeking injunctive relief." *Id.* at 9a-10a. The court of appeals determined that it "need not decide which reading to adopt here because *Douglas* provides us with another avenue to resolve this issue: the 'wholly groundless' inquiry." *Id.* at 11a.

5. Petitioners sought a stay of further proceedings in the district court while their appeal was pending. The district court denied petitioners' motion, and the court of appeals (after carrying the stay motion with the merits) denied petitioners' motion as well. App., *infra*, 45a. Petitioners thereafter filed an application with this Court seeking a stay of proceedings pending a petition for a writ of certiorari (No. 17A859). On March 2, 2018, the Court granted petitioners' application and entered a stay pending the disposition of this petition.

REASONS FOR GRANTING THE PETITION

This case presents a straightforward conflict among the courts of appeals on an important and frequently recurring question involving the FAA. There is an entrenched conflict on the question whether the FAA permits a court to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes the claim of arbitrability is "wholly groundless." Four courts of appeals, including the court below, have held that courts may resolve gateway disputes over arbitrability themselves, even if the arbitration agreement contains a delegation provision, if the court determines that the underlying claim for arbitration is "wholly groundless." But two other courts of appeals have held that, under this Court's precedents, disputes about arbitrability must be decided by an arbitrator whenever the parties have delegated that issue to an arbitrator, regardless of the court's views about the merits of the arbitrability issue. Only this Court can resolve that conflict, and this case is an excellent vehicle in which to do so. The petition for a writ of certiorari should therefore be granted.

A. The Decision Below Conflicts With The Decisions Of Other Courts of Appeals

The court of appeals' decision reinforces an existing conflict among the circuits on the question whether the FAA permits a court to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes the claim of arbitrability is "wholly groundless." Other courts of appeals have expressly recognized the conflict among the circuits on this issue, see, *e.g.*, *Jones* v. *Waffle House, Inc.*, 866 F.3d 1257, 1268-1269 (11th Cir. 2017); *Simply Wireless, Inc.* v. *T-Mobile US, Inc.*, 877 F.3d 522, 528 (4th Cir. 2017), as have legal commentators, see Neal Ross Marder et al., *Waffle House Arbitration Ruling May Reach Past Eleventh Circuit*, Law360 (Aug. 17, 2017) <tinyurl.com/wafflehouseruling>. That conflict, on an important question of federal law, plainly warrants the Court's review.

1. Four courts of appeals, including the court of appeals in this case, have held that a court may decline to compel arbitration, despite the parties' delegation of questions of arbitrability to an arbitrator, if the court concludes that the claim for arbitration is "wholly groundless."

In the earliest of those decisions, *Qualcomm Inc.* v. *Nokia Corp.*, 466 F.3d 1366 (Fed. Cir. 2006), a patentee filed suit against a competitor alleging infringement of patents related to a particular technology. See *id.* at 1368-1369. The defendant moved to compel arbitration and to stay the litigation, citing an arbitration provision in the parties' license agreement concerning a different technology. See *id.* at 1369. A divided panel of the Federal Circuit vacated the district court's order denying a stay, concluding that the court had erred in believing that it was

required to rule on the arbitrability of the defendant's defenses itself. See *id.* at 1374. The Federal Circuit stated that the court should first have considered "who has the primary power to decide arbitrability under the parties' agreement." *Id.* at 1371. Pertinently for present purposes, the Federal Circuit added that, if the court determined that the parties did intend to delegate the power to decide arbitrability to an arbitrator, "then the court should perform a second, more limited inquiry to determine whether the assertion of arbitrability is 'wholly groundless.'" *Ibid.* (quoting *Dream Theater, Inc.* v. *Dream Theater*, 21 Cal. Rptr. 3d 322, 326 (Cal. Ct. App. 2004)).

The Sixth Circuit adopted a materially identical standard in *Turi* v. *Main St. Adoption Services, LLP*, 633 F.3d 496 (2011). There, the defendants sought to compel arbitration based on a provision requiring arbitration of "[a]ny controversy or claim arising out of th[e] agreement." *Id.* at 506. The district court denied the defendants' motion, and the Sixth Circuit affirmed. See *id.* at 499. The Sixth Circuit recognized that "the question of whether a particular dispute is arbitrable is distinct from the issue of who should decide that question." *Id.* at 511. But like the Federal Circuit in *Qualcomm*, the Sixth Circuit reasoned that, "even where the parties expressly delegate to the arbitrator the authority to decide the arbitrability of the claims related to the parties' arbitration agreement, this delegation applies only to claims that are at least *arguably* covered by the agreement." *Ibid.* The Sixth Circuit went on to conclude that, although some of the plaintiffs' claims were clearly covered by the arbitration provisions, others were clearly not, thus obviating the "need for an arbitrator to decide the arbitrability of any of the plaintiffs' claims." *Ibid.*

In *Douglas*, *supra*, a divided panel of the Fifth Circuit joined those circuits in adopting the "wholly groundless" exception. Citing the Federal Circuit's *Qualcomm* decision, the Fifth Circuit determined that, "even *if* there is a delegation provision" in the parties' agreement, "the court must ask whether the averment that the claim falls within the scope of the arbitration agreement is wholly groundless." 757 F.3d at 464. The court determined that the defendant's motion to compel arbitration in that case rested on a "wholly groundless" interpretation of the arbitration agreement because the plaintiff's claim "has nothing whatsoever to do with her arbitration agreement." *Ibid.*

Judge Dennis dissented. He contended that the "wholly groundless" test "appear[ed] to be contrary to Supreme Court precedent" holding that, "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." 757 F.3d at 468 (quoting *AT&T Technologies, Inc.* v. *Communications Workers of America*, 475 U.S. 643, 649 (1986)). He added that "the Supreme Court would likely reject the majority's approach as being contrary to its previous decisions." *Ibid.*

Most recently, in *Simply Wireless*, the Fourth Circuit held that "a district court must give effect to a contractual provision clearly and unmistakably delegating questions of arbitrability to an arbitrator, unless it is clear that the claim of arbitrability is wholly groundless." 877 F.3d at 528 (internal quotation marks and citation omitted). The Fourth Circuit noted the existence of a circuit conflict on the validity of the "wholly groundless" exception, *id.* at 528 n.5, but nevertheless reasoned, relying on the Fifth Circuit's decision in *Douglas*, that a court should not enforce a delegation provision "when a party's assertion that

a claim falls within an arbitration clause is frivolous or otherwise illegitimate," *id.* at 529.

2. The preceding decisions of the Fourth, Fifth, Sixth, and Federal Circuits conflict with decisions of the Tenth and Eleventh Circuits.

In *Belnap* v. *Iasis Healthcare*, 844 F.3d 1272 (2017), the Tenth Circuit reversed a district court's denial of a motion to compel arbitration of a dispute between a surgeon and his employer. See *id.* at 1274. The plaintiff "urge[d]" the Tenth Circuit "to adopt the 'wholly groundless' approach of the Fifth, Sixth, and Federal Circuits." *Id.* at 1285. But "[h]aving thoroughly considered its merits," the Tenth Circuit "decline[d] to adopt" the "wholly groundless" exception. *Id.* at 1286. The Tenth Circuit noted that such an exception "appears to be in tension with language of the Supreme Court's arbitration decisions—in particular, with the Court's express instruction that when parties have agreed to submit an issue to arbitration, courts must compel that issue to arbitration without regard to its merits." *Ibid.* Reviewing this Court's decisions, the Tenth Circuit explained that the Court had "made clear that when parties agree to submit an issue to arbitration, courts are bound to effectuate the parties' intent by compelling arbitration—no matter what the court thinks about the merits of the issue." *Id.* at 1287 (footnote omitted).

In *Jones*, the Eleventh Circuit "join[ed] the Tenth Circuit in declining to adopt * * * the wholly groundless exception." 866 F.3d at 1269. Like the Tenth Circuit, the Eleventh Circuit reasoned that the "wholly groundless" exception "runs against the Supreme Court's unambiguous instruction that lower courts may not 'delve into the merits of the dispute.'" *Id.* at 1269 (quoting *Douglas*, 757 F.3d at 468 (Dennis, J., dissenting)). The Eleventh Circuit

observed that enforcing delegation provisions without regard to the merits of the underlying dispute was "altogether consonant with the FAA's 'liberal federal policy favoring arbitration agreements'" and its "overarching purpose" of "ensur[ing] the enforcement of arbitration agreements according to their terms." *Id.* at 1270 (quoting *Moses H. Cone*, 460 U.S. at 24, and *AT&T Mobility*, 563 U.S. at 344). The court added that "concerns about efficiency cannot justify adopting the wholly groundless exception"; even if questions of judicial economy could be considered, it was "by no means clear that the courts would save time by initially deciding the gateway questions rather than referring them to the arbitrator for resolution." *Ibid.*

3. There can be little doubt that there is a substantial circuit conflict on the question presented, or that the question is ripe for the Court's review. Decisions from six courts of appeals have fully developed the relevant arguments on both sides of the question. And given the depth of the conflict, there is no realistic prospect that it will resolve itself without the Court's intervention. Further review is therefore warranted.

B. The Decision Below Is Incorrect

This Court has repeatedly instructed lower courts to enforce arbitration agreements according to their terms. See, *e.g.*, *American Express Co.* v. *Italian Colors Restaurant*, 570 U.S. 228, 233 (2013); *CompuCredit Corp.* v. *Greenwood*, 565 U.S. 95, 98 (2012); *AT&T Mobility*, 563 U.S. at 339; *Rent-A-Center*, 561 U.S. at 67. The court of appeals ignored that emphatic instruction and instead held that courts may decide gateway questions of arbitrability themselves, even when the parties have delegated the resolution of arbitrability disputes to an arbitrator. That holding cannot stand.

1. "[A]rbitration is simply a matter of contract between the parties." *First Options*, 514 U.S. at 943. Consistent with that principle, parties may "agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Center*, 561 U.S. at 68-69. "Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter." *First Options*, 514 U.S. at 943. And if the parties agree to arbitrate arbitrability, that agreement must be enforced according to its terms under the FAA. See *Rent-A-Center*, 561 U.S. at 70.

In addition, this Court has mandated that an arbitration agreement should be strictly enforced regardless of a court's views of the merits of the claim made by the party seeking to compel arbitration. For example, in *AT&T Technologies, Inc.* v. *Communications Workers of America*, 475 U.S. 643 (1986), the Court explained that the requirement to compel arbitration under valid agreements applies "whether the claims of the party seeking arbitration are "'arguable' or not, indeed even if it appears to the court to be frivolous." *Id.* at 649-650. Whatever the merits of the movant's claim, "[t]he courts * * * have no business weighing the merits of the grievance," because "[t]he agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious." *Id.* at 650.

2. Despite this Court's clear holdings that parties are free to delegate threshold disputes of arbitrability to arbitrators, the court of appeals refused to enforce the delegation provision at issue in this case solely on the ground that petitioners' claim for arbitrability was "wholly

groundless." App., *infra*, 11a-16a. That holding cannot be reconciled with the FAA or with this Court's decisions applying it.

a. First and foremost, the court of appeals' decision finds no basis in the text of the FAA. Section 2 of the FAA establishes that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. That provision does not authorize judicial interference with arbitration agreements; rather, it simply "places arbitration agreements on equal footing with all other contracts." *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443 (2006). And it is undisputed that one party's belief that another party's claims under a contract are "wholly groundless" is not a valid basis for revoking the contract entirely. To the contrary, as explained above, the FAA directs courts to enforce a party's claim for arbitration "even if it appears to the court to be frivolous." *AT&T Technologies*, 475 U.S. at 649-650. Under that rule, "if a court determines that there is clear and unmistakable evidence that the parties agreed to arbitrate arbitrability but nevertheless believes that an underlying claim is almost certainly not subject to arbitration, the court must still order the parties to arbitrate arbitrability." *Douglas*, 757 F.3d at 468 (Dennis, J., dissenting).

In adopting and applying the "wholly groundless" exception, the court of appeals conflated the question of who *decides* arbitrability with the discrete question of who *prevails* on arbitrability. Because the parties here have already answered the first question and assigned responsibility for resolving arbitrability disputes to the arbitrator, there was no need for the court of appeals to reach the second question. The court did so anyway, engaging in an

extended analysis of whether petitioners' claim found "footing within the four corners of the contract." App., *infra*, 16a.

The court of appeals thereby violated the general principle that, "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." *AT&T Technologies*, 475 U.S. at 649. It cannot seriously be disputed that that is exactly what the court of appeals did; indeed, in *Douglas*, the court of appeals forthrightly acknowledged that the "wholly groundless" exception "necessarily requires the courts to examine and, to a limited extent, construe the underlying agreement." 757 F.3d at 464. As this Court has admonished, however, that is exactly what lower courts should avoid doing in cases in which the parties have agreed to arbitrate.

b. The "wholly groundless" exception is also inconsistent with the "liberal federal policy favoring arbitration agreements" embodied in the FAA. *Moses H. Cone*, 460 U.S. at 24. "By its terms, the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 218 (1985).

The court of appeals acknowledged that policy in the decision below, yet reasoned that enforcing the arbitration provision would require it to "override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract." App., *infra*, 16a (emphasis omitted) (quoting *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 294 (2002)). But again, under the parties' agreements, assessing intent and deciding what is or is not "inconsistent with the plain text of the contract" are tasks for

the arbitrator. The court of appeals usurped that authority, elevating its own views over the parties' actual intent as documented in their agreements to arbitrate arbitrability.

To be sure, cases may arise in which a party seeks to compel arbitration for reasons that could be considered "wholly groundless" under any definition of that term. But that hardly means that the party resisting arbitration will invariably be forced to arbitrate against its will. It is a foundational premise of the FAA that arbitrators will be "competent, conscientious, and impartial," *Mitsubishi Motors*, 473 U.S. at 634, and fully capable of deciding even the most complex issues, see *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 232 (1987). Courts must presume that arbitrators can be trusted faithfully to analyze the scope of the disputed provision and to refuse to allow arbitration of claims that fall outside it. The "wholly groundless" exception rejects that presumption, and in that respect is simply a new way of expressing the age-old "judicial hostility to arbitration." *Green Tree Financial Corp.-Alabama* v. *Randolph*, 531 U.S. 79, 89 (2000).

In any event, courts "cannot rely on * * * judicial policy concern[s]" to refuse to honor arbitration agreements. *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 270 (2009). A party that proves the existence of a valid arbitration agreement is entitled to "an order directing that such arbitration proceed *in the manner provided for in such agreement.*" 9 U.S.C. 4 (emphasis added). And that is true despite the possibility that a court might later disagree with the arbitrator's assessment of arbitrability. When the parties have clearly and unmistakably delegated the question of arbitrability to an arbitrator, the initial decision is the arbitrator's—and the arbitrator's

alone—to make. See *Dean Witter Reynolds*, 470 U.S. at 217.

C. The Question Presented Is An Important And Recurring One That Warrants The Court's Review In This Case

The question presented in this case is a recurring one of substantial legal and practical importance. The Court's intervention is necessary to safeguard the FAA's commitment to the enforceability of commercial arbitration agreements and to provide clarity and uniformity in the law. This case, which cleanly presents the question, is an excellent vehicle for the Court's review.

1. As demonstrated by this Court's frequent grants of review in cases involving the FAA, commercial arbitration is a critical part of our Nation's legal system. Among other valuable benefits, arbitration agreements allow private parties to resolve a broad range of disputes while avoiding the costs associated with traditional litigation. Parties frequently seek to maximize those efficiencies by delegating questions of arbitrability to the arbitrator as well.

Under the "wholly groundless" test adopted by the court of appeals, however, a court may effectively nullify an arbitration agreement whenever it concludes, based on its own interpretation of the arbitration provision, that there is not "a legitimate argument that th[e] arbitration clause covers the present dispute." App., *infra*, 11a (alteration in original). The predictable upshot of that approach would be to unleash a wave of potentially protracted "mini-trials" over arbitrability in the district courts, "unnecessarily complicating the law and breeding litigation from a statute that seeks to avoid it." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 275 (1995).

This case well illustrates that concern. Petitioners first moved to compel arbitration in 2012. Yet more than five years later—a period of time long enough for the parties' dispute to have been arbitrated several times over—petitioners, respondent, and the courts are still attempting to resolve the threshold question of who should decide arbitrability. The court of appeals' adoption of the "wholly groundless" exception has thus effectively nullified the very efficiencies that led the parties to agree to arbitration in the first place. Absent this Court's intervention, more parties who seek to arbitrate will similarly be forced to expend significant time and money simply to enforce their arbitration clauses as written.

The deepening circuit conflict on this question has also upended parties' settled expectations regarding the enforceability of arbitration agreements. Numerous commentators have recognized "the uncertainty created by this circuit split." Karen Chesley, *Who Determines If A Dispute Is Arbitrable*, Nat'l L.J. (Nov. 16, 2017); see also, *e.g.*, Marder, *supra*; David Horton, *Arbitration About Arbitration*, 70 Stan. L. Rev. 363, 371 & n.54 (2018); Liz Kramer, *Tenth Circuit Resolves One Arbitrability Circuit Split, But Creates Another*, Arbitration Nation (Jan. 26, 2017) <tinyurl.com/arbitrationnation>.

The uncertainty is exacerbated by the vagueness of the "wholly groundless" inquiry itself. The facts of this case are again instructive: the magistrate judge expressly found that there was a plausible construction of the parties' agreement that required arbitration of respondent's claims, but the district court and the court of appeals reached the opposite conclusion on the same record. Unless this Court acts, parties who have bargained for arbitration agreements that include delegation provisions will

be unsure whether those provisions are binding and enforceable. That result is contrary to the FAA's "principal purpose" of "ensur[ing] that private arbitration agreements are enforced according to their terms." *AT&T Mobility*, 563 U.S. at 344.

In addition, the circuit conflict on the validity of the "wholly groundless" exception will "encourage and reward forum shopping." *Southland Corp.* v. *Keating*, 465 U.S. 1, 15 (1984). As matters currently stand, indisputably valid delegation provisions in arbitration agreements are always enforceable in some circuits, but only sometimes enforceable in others. Courts in the latter circuits (such as the Eastern District of Texas, where this case was litigated) will accordingly become the forums of choice for plaintiffs seeking to capitalize on "judicial hostility to arbitration agreements." *Gilmer*, 500 U.S. at 24. Inconsistency of that sort is intolerable under the FAA, which was intended to establish nationwide standards for the enforcement of arbitration agreements. Indeed, this Court routinely grants certiorari even where a circuit conflict is shallow (or non-existent) when the question presented concerns the interpretation of the FAA. See *New Prime Inc.* v. *Oliveira*, cert. granted, No. 17-340 (Feb. 26, 2018);[2] *Italian Colors*, 570 U.S. at 228; *AT&T Mobility*, *supra*; *Stolt-Nielsen S.A.*, 559 U.S. at 662. In light of that practice, this case, which presents a clear and important

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[2] *New Prime* presents a distinct question from the one in this case, but it likewise concerns the circumstances under which a court must enforce a valid delegation provision in an arbitration agreement. See Pet. at i, *New Prime*, *supra* (No. 17-340). If the Court grants the instant petition, it may wish to order that petitioners' case and *New Prime* be argued on the same day in October Term 2018, allowing the Court to consider the questions in the two cases at the same time.

conflict involving six circuits, cries out for the Court's review.

2. This case is an apt vehicle in which to decide the question presented. Whether the "wholly groundless" exception is consistent with the FAA is a pure question of law, and it formed the sole basis for the court of appeals' decision below. As such, there is no threshold obstacle to reviewing and resolving that question in this case. In addition, the courts of appeals have comprehensively analyzed the arguments for and against the existence of a "wholly groundless" exception to arbitrability. Accordingly, this case provides the Court with an excellent opportunity to consider and resolve the question presented.

There is no basis in law or logic for imposing on the FAA an exception for "wholly groundless" claims of arbitrability. The court of appeals' contrary decision was erroneous, and the Court should grant the petition for certiorari to correct that error and resolve a circuit conflict that is affecting parties to arbitration agreements across the country.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2018

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-41674

ARCHER AND WHITE SALES, INC.,
Plaintiff-Appellee

v.

HENRY SCHEIN, INC., DANAHER CORPORATION, INSTRUMENTARIUM DENTAL INC., DENTAL EQUIPMENT LLC, KAVO DENTAL TECHNOLOGIES LLC, AND DENTAL IMAGING TECHNOLOGIES CORPORATION,
Defendants-Appellants

FILED: December 21, 2017

Before HIGGINBOTHAM, GRAVES, and HIGGINSON, Circuit Judges.

OPINION

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Sued by a competitor for antitrust violations, Defendants-Appellants sought to enforce an arbitration agreement. The magistrate judge granted the motion to compel

arbitration, holding that the gateway question of the arbitrability of the claims belonged to an arbitrator. The district court reversed, holding it had the authority to rule on the question of arbitrability and the claims at issue were not arbitrable. We now affirm.

I.

Five years ago, Plaintiff-Appellee Archer and White Sales, Inc. ("Archer"), a distributor, seller, and servicer for multiple dental equipment manufacturers, brought this suit against Defendant-Appellants Henry Schein, Inc. and Danaher Corporation, allegedly the largest distributor and manufacturer of dental equipment in the United States, and certain wholly-owned subsidiaries of Danaher.

The suit alleges violations of Section 1 of the Sherman Antitrust Act and the Texas Free Enterprise and Antitrust Act, contending that the Defendants' activities occurred over the preceding four years and are "continuing" violations, and seeking both damages ("estimated to be in the tens of millions of dollars") and injunctive relief.[1] The district court referred the case to a United States Magistrate Judge.

Defendants moved to compel arbitration pursuant to a clause in a contract between Archer and Pelton & Crane,

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[1] Archer alleges that Defendants conspired "to fix prices and refuse to compete with each other" and to "force their common supplier Danaher and its various subsidiaries to terminate and/or reduce the distribution territory of their price-cutting distributor Archer Dental." It also alleges that the Defendants "carried out their conspiracy through a series of unlawful activities, including, but not limited to agreements not to compete, agreements to fix prices, and boycotts."

allegedly a Defendant's predecessor-in-interest (the "Dealer Agreement"). The arbitration clause reads as follows:

> Disputes. This Agreement shall be governed by the laws of the State of North Carolina. Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets, or other intellectual property of Pelton & Crane), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association [(AAA)]. The place of arbitration shall be in Charlotte, North Carolina.

Following a hearing, the magistrate judge issued a Memorandum Order holding that: (1) the incorporation of the AAA Rules in the arbitration clause clearly evinced an intent to have the arbitrator decide questions of arbitrability; (2) there is a reasonable construction of the arbitration clause that would call for arbitration in this dispute; and (3) the *Grigson* equitable estoppel test, which both sides agree is controlling in their dispute, required arbitration against both signatories and non-signatories to the Dealer Agreement.[2]

The district court vacated the magistrate judge's order and held that the court could decide the question of

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[2] *Archer & White Sales, Inc. v. Henry Schein, Inc.*, No. 2:12-cv-572-JRG-RSP, 2013 WL 12155243 (E.D. Tex. May 28, 2013), *vacated*, 2016 WL 7157421 (E.D. Tex. Dec. 7, 2016).

arbitrability, and that the dispute was not arbitrable because the plain language of the arbitration clause expressly excluded suits that involved requests for injunctive relief. The court declined to reach the question of equitable estoppel.[3]

Defendants appealed.[4]

II.

We review a ruling on a motion to compel arbitration *de novo*.[5] "Enforcement of an arbitration agreement involves two analytical steps."[6] First, a court must decide "whether the parties entered into *any arbitration agreement at all*."[7] This inquiry is one of pure contract formation, and it looks only at whether the parties "form[ed] a valid agreement to arbitrate some set of claims."[8] The next step is to determine "whether [the dispute at issue]

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[3] *Archer & White Sales, Inc. v. Henry Schein, Inc.*, No. 2:12-cv-572-JRG, 2016 WL 7157421, at *9 (E.D. Tex. Dec. 7, 2016).

[4] Defendants filed an interlocutory appeal pursuant to 9 U.S.C. § 16(a)(1)(C). *See Al Rushaid v. Nat'l Oilwell Varco, Inc.*, 757 F.3d 416, 419 (5th Cir. 2014) ("Title 9 U.S.C. section 16(a)(1)(C) provides that a party may seek interlocutory review of an order . . . denying an application . . . to compel arbitration.") (internal quotation marks omitted).

[5] *Kubala v. Supreme Prod. Servs., Inc.*, 830 F.3d 199, 201 (5th Cir. 2016) (citing *Carey v. 24 Hour Fitness, USA, Inc.*, 669 F.3d 202, 205 (5th Cir. 2012)).

[6] *Kubala*, 830 F.3d at 201 (5th Cir. 2016).

[7] *Id.*

[8] *IQ Prods. Co. v. WD-40 Co.*, 871 F.3d 344, 348 (5th Cir. 2017).

is covered by the arbitration agreement."[9] Before this step, however, the court must answer a third question: "*[w]ho should have the primary power to decide*' whether the claim is arbitrable."[10] This question turns on "whether the agreement contains a valid delegation clause—'that is, if it evinces an intent to have the arbitrator decide whether a given claim must be arbitrated.' "[11]

This determination begins the two-step inquiry adopted in *Douglas v. Regions Bank*.[12] First, whether the parties "clearly and unmistakably" intended to delegate the question of arbitrability to an arbitrator.[13] If so, "the motion to compel arbitration should be granted in almost all cases."[14] But not "[i]f the argument that the claim at hand is within the scope of the arbitration agreement is 'wholly groundless.' "[15] So *Douglas*'s second step asks whether there is a plausible argument for the arbitrability

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[9] *Kubala*, 830 F.3d at 201.

[10] *Id.* at 202 (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942 (1995)).

[11] *IQ Prods.*, 871 F.3d at 348 (quoting *Kubala*, 830 F.3d at 202).

[12] 757 F.3d 460, 464 (5th Cir. 2014).

[13] "[C]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *First Options*, 514 U.S. at 944 (citing *AT&T Technologies, Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986)).

[14] *Kubala*, 830 F.3d at 202.

[15] *Douglas*, 757 F.3d at 464.

of the dispute. Where there is no such plausible argument, "the district court may decide the 'gateway' issue of arbitrability despite a valid delegation clause.' "[16]

The parties agree that the Dealer Agreement contained an arbitration provision, though not whether the arbitration provision applies here.[17] Specifically, they disagree on whether the court or an arbitrator should decide the gateway question of arbitrability—and relatedly, whether the underlying dispute is arbitrable at all. We turn to the two-step *Douglas* test.

A.

We first ask if the parties "clearly and unmistakably" delegated the issue of arbitrability.[18] Absent a delegation, "the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."[19] "Just as the arbitrability of the merits of a dispute depends upon

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[16] *IQ Prods.*, 871 F.3d at 349.

[17] Archer states that, because the Dealer Agreement "unambiguously divides disputes into two categories"—those within the carve-out and all other disputes—there is no valid agreement to arbitrate. This argument misconstrues the very first analytical step in enforcement of an arbitration agreement, which asks "whether the parties entered into *any arbitration agreement at all*." Archer does not appear to argue that there was no arbitration agreement regarding claims outside the scope of the carve-out. Instead, Archer contends that the Dealer Agreement is "best construed to express the parties' intent not to arbitrate this action seeking injunctive relief." Thus, we treat Archer's arguments to this effect as going to whether the parties agreed to arbitrate this particular dispute.

[18] *AT&T*, 475 U.S. at 649, 1415.

[19] *Id.*

whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter.' "[20]

A contract need not contain an express delegation clause to meet this standard. An arbitration agreement that expressly incorporates the AAA Rules "presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability."[21] Under AAA Rule 7(a), "the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement."[22]

By the Dealer Agreement, "[a]ny dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets, or other intellectual property of [the predecessor]), shall be resolved by binding arbitration *in accordance with the arbitration rules of the American Ar-*

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[20] *First Options*, 514 U.S. at 943 (internal citations omitted). *See also Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68–69 (2010) (holding that parties may delegate arbitrability through an express delegation clause).

[21] *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012).

[22] This version of Rule 7(a) was in effect when the parties signed their agreement. AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES (2007), https://www.adr.org/sites/default/files/Commercial%20Arbitration%20Rules%20and%20Mediation%20Procedures%20Sept.%201%2C%202007.pdf.

bitration Association." The parties dispute the relationship between the carve-out clause—"except for actions seeking injunctive relief and [intellectual property] disputes"—and the incorporation of the AAA Rules.

The magistrate judge saw three separate parts to the arbitration provision: (1) a general rule compelling arbitration for any dispute related to the agreement, (2) an exemption from arbitration for actions seeking injunctive relief, and (3) a clause incorporating the AAA Rules.[23] On this reading, the AAA Rules would apply to all disputes arising under the contract, including those eventually found to fall within the Dealer Agreement's carve-out. The district court disagreed, holding that the carve-out clause removed the disputes from the ambit of both arbitration and the AAA Rules. The district court distinguished *Petrofac*, where the agreement at issue "did not contain any exclusions[;] [r]ather, it was a standard broad arbitration clause."[24]

Defendants argue that *Petrofac* controls; that, by holding otherwise, the district court conflated the issue of whether the dispute is arbitrable with the issue of who decides arbitrability; and that, under the plain language of the clause, disputes about arbitrability do not fall within the carve-out and thus belong to the arbitrator. This court has previously applied *Petrofac* to arbitration provisions containing carve-out provisions. In *Crawford*, we examined an agreement that incorporated the AAA Rules and preserved the parties' ability to seek injunctive relief in

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[23] *Archer*, 2013 WL 12155243 at *1.

[24] *Archer*, 2016 WL 7157421, at *7.

the courts.[25] We held—without directly addressing the relevance of its carve-out provision—that the *Crawford* agreement's incorporation of the AAA Rules constituted "clear and unmistakable evidence that the parties to the [ ] Agreement agreed to arbitrate arbitrability, and so . . . whether the Plaintiffs' claims are subject to arbitration must be decided in the first instance by the arbitrator, not a court."[26]

Archer responds that the agreement in *Petrofac* did not include a carve-out provision, and the *Crawford*

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[25] *Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 256 (5th Cir. 2014). In that case, the Provider Agreement read, in relevant part:

> Any and all disputes in connection with or arising out of the Provider Agreement by the parties will be exclusively settled by arbitration before a single arbitrator in accordance with the Rules of the American Arbitration Association. The arbitrator must follow the rule of Law, and may only award remedies provided for in the Provider Agreement . . . . Arbitration shall be the exclusive and final remedy for any dispute between the parties in connection with or arising out of the Provider Agreement; provided, however, that nothing in this provision shall prevent either party from seeking injunctive relief for breach of this Provider Agreement in any state or federal court of law. . . .

Id.

[26] *Id.* at 263. Defendants also point to Oracle, where the Ninth Circuit addressed an arbitration clause that adopted the UNCITRAL Rules (which also delegate arbitrability issues to the arbitrator) and a carve-out for certain types of claims. The court rejected the argument that the carve-out provision bore on the question of arbitrability, stating that such an argument "conflates the scope of the arbitration clause . . . with the question of who decides arbitrability." *Oracle Am., Inc. v. Myriad Group A.G.*, 724 F.3d 1069, 1072–76 (9th Cir. 2013)

agreement is distinguishable because it contained separate clauses incorporating the AAA Rules and creating a carve-out excluding claims for injunctive relief—specifically, the agreement stated that the AAA Rules would apply to "[a]ny and all disputes in connection with or arising out of the Provider Agreement," and contained a carve-out in a subsequent sentence stating that nothing in the agreement would prevent a suit seeking injunctive relief in a court of law.[27]

Archer argues that, in contrast, the structure of the specific carve-out at issue here leads to the natural reading that the AAA Rules only apply to the category of cases that are subject to binding arbitration under the Dealer Agreement—namely, those outside of the contract's express carve-out. Archer further notes that Defendants' predecessor-in-interest drafted the Dealer Agreement, and that North Carolina law requires that "[p]ursuant to well [ ]settled contract law principles, the language of [an] arbitration clause should be strictly construed against the drafter of the clause."[28]

There is a strong argument that the Dealer Agreement's invocation of the AAA Rules does not apply to cases that fall within the carve-out. It is not the case that any mention in the parties' contract of the AAA Rules trumps all other contract language. Here, the interaction between the AAA Rules and the carve-out is at best ambiguous. On one reading, the Rules apply to "[a]ny dispute arising under or related to [the] Agreement." On another, the provision expressly exempts certain disputes and the

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[27] *Crawford*, 748 F.3d at 256.

[28] *T.M.C.S., Inc. v. Marco Contractors, Inc.*, 780 S.E.2d 588, 597 (N.C. Ct. App. 2015).

Rules apply only to the remaining disputes. We need not decide which reading to adopt here because *Douglas* provides us with another avenue to resolve this issue: the "wholly groundless" inquiry.

B.

Regardless of whether an agreement clearly and unmistakably delegates the question of arbitrability, the second step in *Douglas* provides a narrow escape valve. If an "assertion of arbitrability [is] wholly groundless," the court need not submit the issue of arbitrability to the arbitrator.[29]

We have cautioned that the "wholly groundless" exception is a narrow one and that it "is not a license for the court to prejudge arbitrability disputes more properly left to the arbitrator pursuant to a valid delegation clause."[30] "An assertion of arbitrability is not 'wholly groundless' if 'there is a legitimate argument that th[e] arbitration clause covers the present dispute, and, on the other hand, that it does not.' "[31] If a court can find "a 'plausible' argument that the arbitration agreement requires the merits of the claim to be arbitrated," the wholly groundless exception will not apply.[32]

The magistrate judge issued his order before *Douglas*, and therefore he did not address the "wholly groundless"

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[29] *Douglas*, 757 F.3d at 463 (quoting *Agere Systems, Inc. v. Samsung Elecs. Co.*, 560 F.3d 337, 340 (5th Cir. 2009)).

[30] *Kubala*, 830 F.3d at 202 n.1.

[31] *IQ Prods.*, 871 F.3d at 350 (quoting *Douglas*, 757 F.3d at 463).

[32] *Kubala*, 830 F.3d at 202 n.1.

exception directly. Instead, he found that while "[o]n the most superficial level, this lawsuit is clearly an action seeking injunctive relief since it *does* seek that relief," there was also "a plausible construction [of the Dealer Agreement] calling for arbitration."[33] Thus, he concluded that "the question of whether the exception for actions seeking injunctive relief should be limited to actions for an injunction in aid of arbitration or to enforce an arbitrator's award should properly be left for the arbitrator to decide."[34]

The district court, now with *Douglas* at hand, found the Defendants' arguments for arbitrability wholly groundless. The court first stated that the wholly groundless inquiry "necessarily requires the courts to examine and, to a limited extent, construe the underlying agreement."[35] It then noted that the Dealer Agreement's carve-out language "differs from the standard arbitration clause suggested by [AAA],"[36] and found that "the phrase 'except actions seeking injunctive relief' is clear on its face—any

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[33] *Archer*, 2013 WL 12155243, at *1–2.

[34] *Id.* at *2.

[35] *Archer*, 2016 WL 7157421, at *8 (quoting *Douglas*, 757 F.3d at 463) (internal quotation marks omitted). This limited inquiry allows the parties to avoid jumping through hoops to begin arbitration only to be sent directly back to the courthouse. See *Douglas*, 757 F.3d at 464 ("When [plaintiff] signed the arbitration agreement containing a delegation provision, did she intend to go through the rigmaroles of arbitration just so the arbitrator can tell her in the first instance that her claim has nothing whatsoever to do with her arbitration agreement, and she should now feel free to file in federal court? Obviously not.").

[36] The district court claimed that "[s]uch an intentional drafting effort" deserves notice. *Archer*, 2016 WL 7157421.

action seeking injunctive relief is excluded from mandatory arbitration."[37] Thus, the provision's plain language includes all actions seeking injunctive relief, not a more limited category of cases. The court declined to "re-write the terms of the Parties' agreement to accommodate a party—notably the party that drafted the agreement—that could have negotiated for more precise language,"[38] and held that the arguments for arbitrability were "wholly without merit based on the plain language of the arbitration clause itself" and fell squarely within the *Douglas* exception.[39]

Defendants suggest a limited reading of the "wholly groundless" exception that would only apply when the contract containing the arbitration provision has "nothing to do with" the dispute before the court.[40] In *Douglas*, the plaintiff had signed an agreement with an arbitration provision when she opened a checking account with Regions Bank that closed less than one year later. Years later, the plaintiff was involved in an automobile accident,

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[37] *Id.*

[38] *Id.* at *6.

[39] *Archer*, 2016 WL 7157421, at *9. The district court also rejected arguments from Defendants that Archer failed to "plead" a claim for injunctive relief based on the fact that Archer had not made any showing on the factors articulated by the Supreme Court in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006). The court held first that the *eBay* factors are not pleading requirements, and that in any event, the proper vehicle to argue the plaintiff is not entitled to relief would be a motion to dismiss under Rule 12. We do not address the underlying merits of Archer's claim here because, as Defendants concede, "the issue here is not whether Archer's injunctive relief claim fails on the merits."

[40] *Douglas*, 757 F.3d at 461.

and she received a $500,000 settlement in subsequent litigation. She then alleged that her attorney, who banked with Regions, had embezzled that money, and she brought suit against the bank for negligence and conversion on the theory that the bank had notice of the embezzlement and failed to report it. Regions moved to compel arbitration pursuant to the agreement that the plaintiff signed when she opened the now-closed checking account. This court held that "[t]he mere existence of a delegation provision in the checking account's arbitration agreement . . . cannot possibly bind [the plaintiff] to arbitrate gateway questions of arbitrability in *all* future disputes with the other party, no matter their origin."[41]

Defendants argue that applying the "wholly groundless" exception here would allow the court to construe the bounds of an arbitration clause before an arbitrator can do so—effectively obviating the entire purpose of delegating the gateway question to the arbitrator in the first place; that their arbitrability arguments are not wholly groundless, pointing to the magistrate judge's finding of plausible readings of the arbitration clause that would not exclude the suit from arbitration; and that doubts about the arbitrability of a claim should be resolved in favor of arbitration, pursuant to settled federal law.

Defendants urge that "[t]he correct reading of this arbitration clause is that the parties may come to court seeking injunctive relief at any time . . . but still must arbitrate any claim for damages." Defendants further urge the court should send the damages clause to arbitration, even if it results in "piecemeal litigation." In their view, "[t]he

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[41] *Id.* at 462, 464.

correct reading of this arbitration clause is that the parties may come to court seeking injunctive relief at any time . . . but still must arbitrate any claim for damages."

Archer counters that the plain language of the clause makes clear that the parties did not agree to arbitrate *actions* that involve a request for injunctive relief, and that any argument to the contrary is wholly groundless. Archer emphasizes that arbitration agreements are "as enforceable as other contracts, but not more so,"[42] and states that under North Carolina law, "when the terms of a contract are plain and unambiguous, there is no room for construction. The contract is to be interpreted as written and enforced as the parties have made it."[43] Archer says the Dealer Agreement clearly contemplates two categories of disputes—those involving "actions seeking injunctive relief" and certain intellectual property disputes, and all other disputes—and that only the latter category must be subject to arbitration. Archer contends that the clause's incorporation of "action" prohibits any piecemeal litigation because "action," as distinct from "claim," pertains to all of the claims in a given case.[44]

While *Douglas* is a recent case, with contours of the "wholly groundless" exception not yet fully developed, if the doctrine is to have any teeth, it must apply where, as here, an arbitration clause expressly excludes certain

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[42] See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12, 87 (1967).

[43] *State v. Philip Morris USA Inc.*, 363 N.C. 623, 685 (2009) (internal quotation marks omitted) (internal citations omitted).

[44] An action is "[a] civil or criminal judicial proceeding," which is "nearly if not quite synonymous" with suit. BLACK'S LAW DICTIONARY 28–29 (7th ed. 1999).

types of disputes. The arbitration clause creates a carve-out for "actions seeking injunctive relief." It does not limit the exclusion to "actions seeking *only* injunctive relief," nor "actions for injunction in aid of an arbitrator's award." Nor does it limit itself to only *claims* for injunctive relief. Such readings find no footing within the four corners of the contract. "When the language of a contract is clear and unambiguous, effect must be given to its terms, and the court, under the guise of construction, cannot reject what the parties inserted or insert what the parties elected to omit."[45] We see no plausible argument that the arbitration clause applies here to an "action seeking injunctive relief." The mere fact that the arbitration clause allows Archer to avoid arbitration by adding a claim for injunctive relief does not change the clause's plain meaning. "While ambiguities in the language of the agreement should be resolved in favor of arbitration, we do not override the clear intent of the parties, *or reach a result inconsistent with the plain text of the contract*, simply because the policy favoring arbitration is implicated."[46]

III.

Defendants argue in the alternative that, even if the district court was correct to decide the issue of arbitrability, it erred in determining that the complaint was not subject to the arbitration clause. Because we find that Defendants' arguments for arbitrability are wholly groundless, we affirm the district court's holding that the

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[45] *Procar II, Inc. v. Dennis*, 721 S.E.2d 369, 371 (N.C. Ct. App. 2012).

[46] *E.E.O.C. v. Waffle House*, 534 U.S. 279, 294 (2002) (emphasis added).

claims are not arbitrable. Having concluded that this action is not subject to mandatory arbitration, we need not reach the question of whether the third parties to the arbitration clause in this case can enforce such an arbitration clause.

We affirm the district court's order denying the motions to compel arbitration.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

ARCHER AND WHITE SALES, INC.,
Plaintiff,

v.

HENRY SCHEIN, INC. ET AL.,
Defendants.

Civil Action No. 2:12-cv-572-JRG

MEMORANDUM OPINION AND ORDER

Before the Court is Plaintiff's Motion for Reconsideration (Dkt. No. 45) of the Magistrate Judge's Memorandum Order (Dkt. No. 44). Having fully considered the briefing and the Parties' arguments at the hearing on November 9, 2016, the Court finds that Plaintiff's Motion should be and hereby is **GRANTED.**

I. BACKGROUND

a. Factual Background

According to the Complaint, Plaintiff Archer and White Sales ("Plaintiff") is a distributor of dental equipment that competes directly against Defendant Henry Schein, Inc. ("Schein") and Company X

(not named as a defendant in this action). Plaintiff is allegedly known nationally among dental professionals for its low prices and high-quality service. (Compl. at 7.) Schein is alleged to be the largest distributor of dental equipment in the United States. (Compl. at 5.) Defendant Danaher Corporation ("Danaher") is allegedly the largest manufacturer of dental equipment in the United States. (Compl. at 4.) The remaining defendants—Instrumentarium, Dental Equipment LLC d/b/a Pelton & Crane, Dental Equipment LLC d/b/a DCI Equipment, KaVo, and Gendex—are alleged to be wholly-owned subsidiaries of Danaher, which were acquired by Danaher since 2004. (Compl. at 4-7.) Danaher and these subsidiaries are sometimes referred to herein as the "Manufacturer Defendants."

Plaintiff alleges that Schein and Company X have conspired to fix prices and to refuse to compete with each other in the sale of dental equipment to dental professionals. (Compl. at 1–2.) Moreover, Plaintiff alleges that Schein and Company X have conspired with the Manufacturer Defendants to terminate and/or reduce Plaintiff's distribution territory in response to Plaintiff's low prices. (Compl. at 2.) Plaintiff claims that this termination constitutes an illegal boycott, orchestrated by the Defendants to perpetuate the price-fixing agreement and the agreement not to compete between Schein and Company X. (Compl. at 2.) Plaintiff further claims that Danaher, as the common supplier to all three horizontal competitors, knowingly participated in this illegal boycott. (Compl. at 2.)

b. Procedural Background

On August 31, 2012, Plaintiff filed suit against Defendant Schein and the Manufacturer Defendants

alleging violations of Section 1 of the Sherman Act, violations of Section 16 of the Clayton Act, and violations of the Texas Free Enterprise and Antitrust Act. Soon after, on September 26, 2012, the Manufacturer Defendants filed a Motion to Compel Arbitration and Stay All Proceedings (Dkt. No. 10). A few days later, Defendant Schein also filed a Motion to Compel Plaintiff to Arbitrate and to Stay Proceedings (Dkt. No. 14). After holding a hearing on these the Motions, the Magistrate Judge on May 28, 2013, issued an Order granting both Motions, staying the action pending arbitration of the asserted claims, and directing the Parties to notify the Court upon completion or abandonment of the arbitration process (Dkt. No. 44)

On June 10, 2013, Plaintiff filed this Motion for Reconsideration of the Magistrate Judge's Order (Dkt. No. 45). Although Plaintiff styled its filing as a "Motion for Reconsideration," the first sentence of the Motion reads: "Plaintiff Archer and White Sales, Inc. ('Archer') objects to and moves for reconsideration of the May 28, 2013, Memorandum Order." (Dkt. No. 45 at 1.) As such, it was unclear whether Plaintiff intended to have the Magistrate Judge reconsider his Order or whether Plaintiff intended to file objections to the Order under Rule 72(a). Having reviewed the Motion in full, and noting that Plaintiff filed its Motion within fourteen days of the Magistrate Judge's Order, the Court finds that Plaintiff intended its Motion to be considered as objections to the Magistrate Judge's Order, rather than as a Motion for the Magistrate Judge to reconsider that Order. The Court now reviews the Motion accordingly.

II. STANDARD OF REVIEW

A party may file objections to a magistrate judge's order regarding a nondispositive matter within fourteen days of the order. Fed. R. Civ. Pro. 72(a).[1] A district judge may modify or set aside any part of the order that is clearly erroneous or contrary to law. *Id.*

III. LEGAL STANDARD

Under the Federal Arbitration Act ("FAA"), an arbitration agreement that involves interstate commerce is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2012). Section 3 of the FAA requires courts to stay court proceedings pending arbitration for any issue covered by an arbitration

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[1] The Fifth Circuit has yet to determine the appropriate standard for reviewing a magistrate judge's ruling on motions to compel arbitration. *Lee v. Plantation of Louisiana, L.L.C.*, 454 F. App'x 358, 360 (5th Cir. 2011) ("[W]e need not reach the question of whether a motion to compel arbitration is a dispositive or non-dispositive motion for purposes of the standard of review by the district judge of the magistrate judge's order.") Other courts, however, have concluded that a ruling on a motion to compel arbitration is a non-dispositive ruling. *See PowerShare, Inc. v. Syntel, Inc.*, 597 F.3d 10, 13–15 (1st Cir. 2010); *Virgin Islands Water & Power Auth. v. Gen. Elec. Int'l Inc.*, 561 F. App'x 131, 134–35 (3d Cir. 2014); *Tige Boats, Inc. v. Interplastic Corp.*, No. 1:15-CV-0114-P-BL, 2015 WL 9268423, at *1–3 (N.D. Tex. Dec. 21, 2015) (holding that the magistrate judge's ruling compelling arbitration was non-dispositive where the ruling stayed the case rather than dismissing the case pending arbitration). Moreover, when "review of a non-dispositive motion by a district judge turns on a pure question of law, that review is plenary under the 'contrary to law' branch of the Rule 72(a) standard," and thus "there is no practical difference between review under Rule 72(a)'s 'contrary to law' standard and review under Rule 72(b)'s de novo standard." *PowerShare*, 597 F.3d at 15.

agreement. 9 U.S.C. § 3. *See also Hornbeck Offshore Corp. v. Coastal Carriers Corp.*, 981 F.2d 752, 754 (5th Cir. 1993).

At a high level, courts perform a two-step inquiry to determine whether to compel a party to arbitrate. *Dealer Computer Servs. v. Old Colony Motors, Inc.*, 588 F.3d 884, 886 (5th Cir. 2009). First, a court must determine whether the parties agreed to arbitrate the particular dispute at issue. *Id. See also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). If so, the court must next determine whether any applicable federal statute or policy renders the claims nonarbitrable. *Dealer Computer Servs.*, 588 F.3d at 886. In other words, the court must determine "whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims." *Mitsubishi Motors*, 473 U.S. at 628. With respect to the first inquiry, there are two separate considerations: whether a valid agreement to arbitrate *some* claims exists (contract formation) and whether the dispute at hand falls within the terms of that valid agreement (contract interpretation). *Dealer Computer Servs.*, 588 F.3d at 886. In this case, the Parties do not dispute that a valid agreement to arbitrate *some* set of claims exists. However, the Parties dispute whether that agreement covers the Plaintiff's claims in this case.

"Arbitration is a matter of contract between the parties, and a court cannot compel a party to arbitrate unless the court determines the parties agreed to arbitrate the dispute in question." *Pennzoil Exploration & Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1064 (5th Cir. 1998). The FAA "does not require parties to arbitrate when they have not agreed to do so, nor does it prevent parties who do agree to arbitrate from excluding

certain claims from the scope of their arbitration agreement." *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) (internal citation omitted).

a. The Question of Arbitrability

Although in most circumstances the Supreme Court has recognized a liberal policy in favor of arbitration, the Court has "made clear that there is an exception to this policy: The question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the '*question of arbitrability*,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.' " *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (first quoting *AT&T Technologies*, 475 U.S. at 649 (emphasis added); then quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)). Although the Court's definition of "question of arbitrability" is narrow, it includes "a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." *Howsam*, 537 U.S. at 84 (citing *AT&T Technologies*, 475 U.S. at 651-52).

The Court has also explained that "[j]ust as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter." *First Options*, 514 U.S. at 943 (internal citations omitted). As to questions of arbitrability, the Court applies a "strong pro-court presumption as to the parties' likely intent." *Howsam*, 537 U.S. at 86. *See also Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068

n.2 (2013) (noting that questions of arbitrability are "presumptively for courts to decide"); *Houston Ref., L.P. v. United Steel, Paper & Forestry, Rubber, Mfg.*, 765 F.3d 396, 408 (5th Cir. 2014) ("[T]he law presumes that courts have plenary power to decide the gateway question of a dispute's 'arbitrability'—*i.e.*, 'whether [the parties] agreed to arbitrate the merits.' ") (quoting *First Options*, 514 U.S. at 942). Thus, the Court has held that "[u]nless the parties *clearly and unmistakably* provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *Howsam*, 537 U.S. at 86. *See also First Options*, 514 U.S. at 944 ("Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so.") (quoting *AT&T Technologies*, 475 U.S. at 649).

IV. ANALYSIS

The arbitration clause at issue in this case is found in a Dealer Agreement between Pelton & Crane[2] and Archer and White Sales, dated October 4, 2007, which established Archer and White Sales as a distributor of Pelton & Crane products. (Dkt. No. 46-1, Ex. C.) The arbitration clause states:

> Disputes. This Agreement shall be governed by the laws of the State of North Carolina. Any dispute arising under or related to this Agreement (except for

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[2] The same arbitration clause is found in Addendum 2 to the Marus Dealer Agreement (with the name "Marus Dental" substituted for "Pelton & Crane") (Dkt. No. 46-1, Ex. D) and Addendum 2 to the DCI Equipment Dealer Agreement (with the name "DCI Equipment" substituted for "Pelton & Crane") (Dkt. No. 46-1, Ex. E).

> actions seeking injunctive relief and disputes related to trademarks, trade secrets or other intellectual property of Pelton & Crane) shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association. The place of arbitration shall be in Charlotte, North Carolina.

Here, the Parties dispute whether they agreed to arbitrate antitrust claims. Additionally, the Parties disagree as to who should make that determination—the arbitrator or this Court.

Plaintiff argues that this action is unambiguously excluded from the arbitration clause because the clause expressly excludes "actions seeking injunctive relief"—and it is not disputed that Plaintiff seeks injunctive relief. (Dkt. No. 45, at 3-9.) Defendant responds by contending that a claim for injunctive relief can be added to most lawsuits, and Plaintiff should not be able to evade arbitration by merely asking for injunctive relief in addition to Plaintiff's claim for damages. (Dkt. No. 46, at 7.) According to Plaintiff, however, the fact that a plaintiff may put forth a claim for damages in addition to a claim for injunctive relief is simply irrelevant, and the Court must give the contract its plain and unambiguous meaning. (Dkt. No. 45, at 4.) As such, Plaintiff objects to the Magistrate Judge's ruling on the grounds that it is contrary to the plain language of the arbitration clause. (Dkt. No. 45, at 4.) Further, both sets of Defendants argue that the Magistrate Judge correctly held that the question of arbitrability should be determined by the arbitrator rather than this Court.

c. Scope of Arbitration Clause

"[A] valid agreement to arbitrate applies 'unless it can be said with positive assurance that [the] arbitration clause is not susceptible of an interpretation which would cover the dispute at issue.'" *Pers. Sec. & Safety Sys. Inc. v. Motorola Inc.*, 297 F.3d 388, 392 (5th Cir. 2002) (quoting *Neal v. Hardee's Food Sys., Inc.*, 918 F.2d 34, 37 (5th Cir. 1990)). However, to determine the scope of an arbitration agreement, "we look first to whether the parties agreed to arbitrate a dispute, not to general policy goals." *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002). As such, "[w]hile ambiguities in the language of the agreement should be resolved in favor of arbitration, we do not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated." *Waffle House*, 534 U.S. at 294 (internal citation omitted). The FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Volt Info. Scis., Inc.*, 489 U.S. at 478.

The Manufacturer Defendants argue that the only "sensible" construction of the arbitration clause would require arbitration of the present action. (Dkt. No. 46, at 6.) Specifically, the Manufacturer Defendants argue that this dispute is "related to" the parties' agreement because the rights Plaintiff seeks to vindicate were created by the Dealer Agreement. (Dkt. No. 46, at 6.) As to the express exclusion of actions seeking injunctive relief, the Manufacturer Defendants argue that Plaintiff's interpretation of the clause would significantly weaken the arbitration clause and thus cannot be correct. (Dkt. No. 46, at 7.) According to the Manufacturer Defendants,

a party's "mere inclusion of a boilerplate request for injunctive relief in a complaint otherwise seeking a jury trial for a damages claim" would suffice to remove an action from arbitration. (Dkt. No. 46, at 7.) As such, the Manufacturer Defendants propose another interpretation of that express exclusion: that the exclusion is intended to "allow[ ] a party to seek injunctive relief in court, particularly where the issue in dispute involves 'trademarks, trade secrets or other intellectual property,' or to seek an injunction in aid of arbitration or to enforce an arbitrator's award." (Dkt. No. 46, at 7.) However, these Defendants fail to provide any substantive basis for reading into the Parties' agreement such significant limitations.

Defendant Schein adopts the Manufacturer Defendants' arguments. (Dkt. No. 47, at 13.) Schein also argues that Plaintiff's complaint fails to allege facts to support a claim for injunctive relief. (Dkt. No. 47, at 13.) Specifically, Schein lists the four *eBay* factors and argues that Plaintiff failed to plead the "elements" of a claim for a preliminary or permanent injunction. (Dkt. No. 47, at 13–14.) The Court will address each of the Defendants' arguments in turn.

First, the Court need not affirmatively decide whether the present action falls within the clause which indicates that any disputes "related to" the agreement must be arbitrated, as the ultimate question turns on the clause's express exclusion, which excludes from arbitration "actions seeking injunctive relief."

Second, the phrase "except actions seeking injunctive relief" is clear on its face—any action seeking injunctive relief is excluded from mandatory arbitration. Plaintiff's action seeks injunctive relief. Applying the plain meaning

of the clause, Plaintiff's action is excluded from mandatory arbitration.

As Plaintiff noted in its Response to the Manufacturer Defendants' Motion to Compel, the arbitration clause in the Dealer Agreement differs from the standard arbitration clause suggested by the American Arbitration Association ("AAA"). (Dkt. No. 21, at 6 (citing Dkt. No. 10-3, Ex. B).) Specifically, the clause's exclusion of actions seeking injunctive relief (and trademark disputes) is not part of the AAA's suggested language. The arbitration clause in this case is unique. Such an intentional drafting effort as opposed to dropping in standard language is worthy of the Court's notice.

Third, the Manufacturer Defendants' proposed interpretation of the exclusion clause fails based on the plain language of the clause itself. Those Defendants argue that the exclusion covers only intellectual property disputes or actions seeking injunctions in aid of arbitration. However, no textual basis exists for reading the phrase "actions seeking injunctive relief" as "actions seeking injunctive relief if such injunctions are in aid of arbitration." Further, the clause does not limit the exclusion to actions seeking "only" injunctive relief, and the Court also declines to read that limitation into the document.

A very similar clause was recently addressed by the Southern District of New York in *Frydman v. Diamond*, No. 1:14-CV-8741-GHW, 2015 WL 5294790 (S.D.N.Y. Sept. 10, 2015). The clause that excluded actions from arbitration in that case stated:

> Should any dispute arise between the Parties which gives rise to injunctive or

> equitable relief pursuant to the terms of this Agreement, the Operating Agreements or the Settlement Agreements, then notwithstanding anything else contained in such agreements, ***the party initiating an action seeking injunctive or equitable relief may at his/her/its election bring such action in a court of competent jurisdiction***, and each of the other Parties hereby consent to same and shall not seek to dismiss or move such action to arbitration or other adjudication. *Id.* at *2 (emphasis added).

The parties' arguments in that case mirror the arguments presented to this Court. There, the plaintiff argued that the exception allowed the plaintiff to choose the forum in which to bring any action seeking injunctive relief. *Id.* at *2. Meanwhile, the defendants argued that the clause "was intended to be a narrow exception to the parties' broad agreement to arbitrate, and that the plaintiff's interpretation of [the clause] would render the parties' agreement to arbitrate meaningless because any party could avoid arbitration by simply including any type of claim of injunctive or equitable relief in his complaint." *Id.* at *6. There the defendants also argued that the exclusion should be interpreted as "a standard 'aid of arbitration' provision of the sort that allows a party to an arbitration agreement to seek equitable or injunctive relief either to enforce an arbitral award or to maintain the status quo pending arbitration." *Id.* at *6. The court in that case held that the plain language excluded the plaintiff's action from arbitration because the plaintiff's action sought equitable relief. In reaching the same conclusion, this Court finds persuasive the *Frydman*

Court's emphasis on the plain language chosen and agreed to by the parties.[3]

The Manufacturer Defendants' argument that this reading of the clause would substantially weaken the arbitration clause simply cannot override the plain meaning of the words chosen by the parties in their agreement. To put it concisely, the Court will not re-write the terms of the Parties' agreement to accommodate a party—notably, the party that drafted the agreement[4]—that could have negotiated for more precise language. It is the duty of the courts to "enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Volt Info. Scis., Inc.*, 489 U.S. at 478. *See also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (noting that the purpose of the Federal Arbitration Act was "to make arbitration agreements as enforceable as other contracts, *but not more so*") (emphasis added).

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[3] Although the court in *Frydman* relied on New York state law principles of contract interpretation to underscore the supremacy of the plain language, North Carolina law places the same emphasis on the plain meaning of words in contract interpretation. Under North Carolina law, "when the terms of a contract 'are plain and unambiguous, there is no room for construction. The contract is to be interpreted as written,' . . . and 'enforce[d] . . . as the parties have made it.' " *State v. Philip Morris USA Inc.*, 363 N.C. 623, 632, 685 S.E.2d 85, 91 (2009) (first quoting *Jones v. Casstevens*, 222 N.C. 411, 413, 23 S.E.2d 303, 305 (1942); then quoting *Wachovia Bank & Tr. Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970)) (internal citations omitted).

[4] As Plaintiff noted in its Sur-reply to the Manufacturer Defendants' Motion to Compel, the clause at issue was drafted by Pelton & Crane. (Dkt. No. 33, at 2.)

Finally, Defendant Schein's argument that Plaintiff failed to "plead" a claim for injunctive relief also fails. First, any argument that Plaintiff failed to state a claim for relief should be raised under Federal Rule of Civil Procedure 12. There is no such motion before the Court. Further, the factors articulated by the Supreme Court in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006), are not pleading requirements—rather, they are factors that are to be considered and carefully weighed by a court before an injunction should issue. To put it simply, injunctive relief is a remedy, not a cause of action. *See Prompt Med. Sys., L.P. v. Allscriptsmisys Healthcare Sols., Inc.*, No. 6:10-CV-71, 2011 WL 12863577, at *1 (E.D. Tex. Feb. 11, 2011) (noting that the defendants in that case failed to provide any authority that an injunction must be pleaded with more specific facts). *See also AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986) ("[I]n deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims.").

Given the plain meaning of the language chosen by the Parties, and there being no basis for reading significant limitations into the express exclusion, the Court concludes that there is, in this case, a "positive assurance" that no reasonable interpretation of the arbitration clause would force this action into arbitration. *See Pers. Sec. & Safety Sys.*, 297 F.3d at 392 ("[A] valid agreement to arbitrate applies 'unless it can be said with positive assurance that [the] arbitration clause is not susceptible of an interpretation which would cover the dispute at issue.' ") (quoting *Neal v. Hardee's Food Sys., Inc.*, 918 F.2d 34, 37 (5th Cir. 1990)).

b. The Question of Arbitrability

The Parties disagree as to who should determine the scope of the arbitration clause in this case—the arbitrator or this Court. A general presumption exists in favor of arbitrability being decided by the Court, as "the law presumes that courts have plenary power to decide the gateway question of a dispute's 'arbitrability'—*i.e.*, 'whether [the parties] agreed to arbitrate the merits.' " *Houston Ref., L.P. v. United Steel, Paper & Forestry, Rubber, Mfg.*, 765 F.3d 396, 408 (5th Cir. 2014) (quoting *First Options*, 514 U.S. at 942). Thus, the Court concludes that the question of arbitrability should not be sent to the arbitrator in these narrow circumstances for two reasons: (1) the Parties did not clearly and unmistakably agree to arbitrate the arbitrability of actions seeking injunctive relief; and (2) Defendants' argument that Plaintiff's claims fall within the scope of the arbitration clause is wholly groundless. The Court will address these two independent rationales in turn

i. Clear and Unmistakable Evidence

Courts often find clear and unmistakable evidence of an agreement to arbitrate arbitrability when an agreement includes an express delegation provision. *See, e.g.*, *Aviles v. Russell Stover Candies, Inc.*, 559 F. App'x 413, 415 (5th Cir. 2014) (holding that the delegation clause provided clear and unmistakable evidence that the parties intended to arbitrate arbitrability). "A delegation provision is an 'agree[ment] to arbitrate "gateway" questions of "arbitrability," such as . . . whether [the parties'] agreement covers a particular controversy.'" *Douglas v. Regions Bank*, 757 F.3d 460, 462 (5th Cir. 2014). There is no *express* delegation clause in the

agreement before this Court. Nonetheless, as Schein and the Manufacturer Defendants correctly note, the Fifth Circuit has held that the adoption of the AAA rules to govern arbitration proceedings "presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." *Cooper v. WestEnd Capital Mgmt., L.L.C.*, 832 F.3d 534, 546 (5th Cir. 2016) (quoting *Petrofac, Inc. v. DynMcDermott Petroleum Operations, Co.*, 687 F.3d 671, 675 (5th Cir. 2012)). As such, Defendants rely on *Petrofac* to argue that the Magistrate Judge correctly decided to refer the case to an arbitrator to determine arbitrability based on the Parties incorporation of the AAA rules. (Dkt. No. 46, at 1; Dkt. No. 47, at 13.)

As Plaintiff noted during its oral argument, the arbitration clause in *Petrofac* did not contain any exclusions. Rather, it was a standard broad arbitration clause. Plaintiff also argues that unlike the arbitration clause in *Petrofac*, the arbitration clause here "cabins application of the AAA rules to disputes 'arising under or related to' the Agreement that are *not* 'actions seeking injunctive relief' or 'disputes relating to trademarks, trade secrets or other intellectual property of Pelton & Crane.' " (Dkt. No. 48, at 1 (emphasis added).) In other words, according to Plaintiff, the clause represents an agreement that the AAA rules would govern only when the dispute did *not* fall within the expressly excluded categories. This Court finds such argument to have merit.

Although Plaintiff's argument at first blush appears circular, the logic of Plaintiff's argument holds true given the exclusion expressly set forth by the Parties. For example, if the present action fell *outside* of the clause's express exclusion, any questions as to arbitrability (*e.g.*,

whether a particular cause of action "arises out of or relates to" the agreement) would be sent promptly to the arbitrator. That is not the case here, where the present action falls squarely within the terms of an express carve-out. Indeed, it would be senseless to have the AAA rules apply to proceedings that are not subject to arbitration. As such, there is no reason to believe that incorporation of the AAA rules, including the AAA rule that delegates the question of arbitrability to the arbitrator, should indicate a clear and unmistakable intention that the parties agreed to arbitrate the question of arbitrability in these circumstances—when an action falls squarely within the clause excluding actions like this from arbitration. *See James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 81 (Del. 2006) (addressing a broad arbitration clause that contained a clause allowing injunctive relief to be pursued in court and holding that "[s]ince this arbitration clause does not generally refer *all* controversies to arbitration, the federal majority rule does not apply, and something other than the incorporation of the AAA rules would be needed to establish that the parties intended to submit arbitrability questions to an arbitrator") (emphasis added).

ii. The "Wholly Groundless" Exception

Even if this Court were to find that the adoption of the AAA rules constituted clear and unmistakable evidence that the Parties agreed to arbitrate the question of arbitrability in these unique circumstances, recent guidance from the Fifth Circuit indicates that in narrow circumstances, a court should nonetheless determine arbitrability where a defendant's argument in favor of arbitrability is "wholly groundless." *Douglas*, 757 F.3d at 463–64. In *Douglas*, the Fifth Circuit addressed whether

the question of arbitrability should be sent to the arbitrator. *Id.* at 462. The arbitration clause at issue in that case defined the "disputes" that would be subject to arbitration as including "the validity, enforceability, or scope of this Arbitration provision." *Id.* at 462. Despite the existence of an express delegation clause in the arbitration agreement (which does not exist here), the Fifth Circuit held that the question of arbitrability need not be sent to arbitration. *Id.* at 462–63.

The Circuit held that "[t]he law of this circuit does not require all claims to be sent to gateway arbitration merely because there is a delegation provision." *Id.* at 463. In its analysis, the Fifth Circuit relied on a test established by the Federal Circuit, a test that "most accurately reflects the law—that what must be arbitrated is a matter of the parties' intent." *Id.* at 464.[5] The Federal Circuit's test involves two steps: "(1) did the parties 'unmistakably intend to delegate the power to decide arbitrability to an arbitrator,' and if so, (2) is the assertion of arbitrability 'wholly groundless.' " *Agere Sys., Inc. v. Samsung Elecs. Co.*, 560 F.3d 337, 340 (5th Cir. 2009) (quoting *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1371 (Fed. Cir. 2006)). As applied, "the 'wholly groundless' inquiry 'necessarily requires the courts to examine and, to a limited extent, construe the underlying agreement.' "

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[5] Though cited with approval, it is unclear whether the Fifth Circuit has expressly adopted the Federal Circuit's "wholly groundless" test. Regardless, even if that test has not been adopted by the Fifth Circuit, as discussed in Section IV.b.i above the Court finds that there is not clear and unmistakable evidence that the Parties intended to send the question of arbitrability to an arbitrator because the adoption of the AAA rules in this case applies only to matters subject to arbitration—not to those that are expressly excluded from arbitration.

Douglas, 757 F.3d at 463 (quoting *InterDigital Commc'ns, LLC v. Int'l Trade Comm'n*, 718 F.3d 1336, 1346–47 (Fed. Cir. 2013), vacated on other grounds, 134 S.Ct. 1876 (2014) (vacating on mootness grounds)).

In so holding, the Fifth Circuit emphasized that to hold otherwise would require the plaintiff to go to an arbitrator merely to have the arbitrator "flatly" explain that the claim did not fall within the scope of the agreement and promptly send plaintiff back to court. *Douglas*, 757 F.3d at 463. The Circuit noted the absurdity of such a process:

> When [plaintiff] signed the arbitration agreement containing a delegation provision, did she intend to go through the rigmaroles of arbitration just so the arbitrator can tell her in the first instance that her claim has nothing whatsoever to do with her arbitration agreement, and she should now feel free to file in federal court? Obviously not. *Id.* at 464.

The same unequivocal response from the arbitrator would just as readily occur here, where the plain language of the clause carves out and excludes the action brought by this Plaintiff. As discussed above in Section IV.a, Defendants' argument that this action seeking injunctive relief should be referred to arbitration is wholly without merit based on the plain language of the arbitration clause itself. As a result, the Court finds that even if the inclusion of the AAA rules for disputes not carved out by the Parties' own language is held to be clear and unmistakable evidence that the parties generally agreed to arbitrate the question of arbitrability, Defendants' assertion that this

particular action should be arbitrated is "wholly groundless." Additionally, given the clarity of the arbitration provision discussed above, it would be senseless to refer the issue of arbitrability to the arbitrator, only to have the arbitrator read the plain language of the clause and then send the Parties back to this Court.

The Court recognizes that the "wholly groundless" exception in *Douglas* should be used only in "exceptional" circumstances, and the Court does not seek to expand that narrow exception by applying it in this case. *See Kubala v. Supreme Prod. Servs., Inc.*, 830 F.3d 199, 202 n.1 (5th Cir. 2016) ("Such cases are exceptional, and the rule in *Douglas* is not a license for the court to prejudge arbitrability disputes more properly left to the arbitrator pursuant to a valid delegation clause. So long as there is a 'plausible' argument that the arbitration agreement requires the merits of the claim to be arbitrated, a delegation clause is effective to divest the court of its ordinary power to decide arbitrability."). However, given the precise facts of this case—that there is no express delegation of arbitrability, but simply the adoption of the AAA rules for disputes not excluded from arbitration—and given that the plain meaning of the language at issue leaves Schein and the Manufacturer Defendants with no plausible argument that this action falls within the narrowed parameters of those disputes subject to arbitration, application of the *Douglas* exception is appropriate in this particular case.

c. Equitable Estoppel

Having concluded that this action falls within the express exclusion contained in the parties' arbitration clause and that this action is not subject to mandatory arbitration, the Court need not decide, and does not reach, the

question of whether the third parties to the arbitration clause in this case can enforce such arbitration clause.

V. CONCLUSION

For the foregoing reasons, the Magistrate Judge's Order should be and hereby is **REVERSED**. It is therefore **ORDERED** that the Magistrate Judge's Order (Dkt. No. 44) is hereby **VACATED**. Accordingly, the Motions to Compel Arbitration filed by Defendant Schein and the Manufacturer Defendants are **DENIED**, and the stay previously entered in this case is hereby **LIFTED**.

The trial date for this action is hereby set for February 5, 2018, and the pre-trial hearing date is set for January 8, 2018. Accordingly, the Parties are **ORDERED** to meet and confer and thereafter jointly submit a proposed Docket Control Order to the Court within 14 days of this Order based on the above trial and pre-trial dates.

So **ORDERED** and **SIGNED** this 7th day of December, 2016.

/s/ Rodney Gilstrap
Rodney Gilstrap
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

ARCHER AND WHITE SALES, INC.

v.

HENRY SCHEIN, INC., et al.

Case No. 2:12-CV-572-JRG-RSP

05/28/2013

MEMORANDUM ORDER

ROY S. PAYNE, United States Magistrate Judge.

Currently before the Court are the two motions to compel arbitration, filed by Defendant Henry Schein, Inc. (Dkt. No. 14) and by Defendants Danaher Corporation, Dental Equipment LLC, Dental Imaging Technologies Corporation, Instrumentarium Dental Inc., and KaVo Dental Technologies, LLC (hereinafter "the Manufacturer Defendants") (Dkt. No. 10). For the reasons that follow, the motions are **GRANTED**.

Plaintiff ("Archer") is a distributor of dental equipment and competes directly against Defendant Henry

Schein, Inc. ("Schein"), which is alleged to be the biggest distributor in the country. Defendant Danaher Corporation ("Danaher"), which is alleged to be the biggest manufacturer of dental equipment, has over the last decade acquired all of the other named defendants, formerly its smaller competitors in the dental equipment manufacturing field. Archer alleges that Schein conspired with Danaher and its subsidiaries, and one unnamed large distributor, to restrict Archer's access to the market because Archer was attempting to sell the equipment to dentists at discounted prices. In these motions, the Defendants assert that Archer is bound by arbitration clauses in its distributor agreements with some of the Manufacturer Defendants. Defendants also assert that the doctrine of equitable estoppel allows even the Defendants who are not parties to any contract with Archer containing an arbitration clause to demand arbitration.

The starting point for this case is the arbitration clause itself. However, it must be read against the background of the strong public policy in favor of arbitration expressed in the Federal Arbitration Act. 9 U.S.C. § 1, et seq. The clause provides: "Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes relating to trademarks, trade secrets or other intellectual property of Pelton & Crane[1]) shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association." Three parts of this clause bear upon the outcome of the dispute. First, the opening clause is a broad one, referring as it does to *any* dispute *related* to the agreement. Second, that broad clause has an exception for

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[1] Pelton & Crane was the predecessor of one of the Danaher subsidiaries.

actions seeking injunctive relief. Third, the clause incorporates the rules of the AAA.

The Court has no hesitation in concluding that this lawsuit is a dispute "related" to the distributor agreement. After all, the very rights that Archer claims the Defendants conspired to defeat were created by the distributor agreement and others like it that the record suggests have similar arbitration clauses. *E.g.*, Dkt. No. 24 at 11. The fact that Archer was an authorized dealer for the equipment at issue is essential to its claims. However, the exception carved out for actions seeking injunctive relief is problematic to the motions to compel arbitration. On the most superficial level, this lawsuit is clearly an action seeking injunctive relief since it *does* seek that relief. On the other hand, it does not seek *only* injunctive relief, and the Court is persuaded that damages (described in Paragraph 1 of the Complaint as "in the tens of millions of dollars") are the predominant relief sought. The incorporation of the rules of the AAA provides the answer to this problem, as those rules very clearly state that the question of the arbitrability of a dispute is referred to the arbitrator under the AAA rules.

In *Petrofac, Inc. v. DynMcDermott Petrol Operations, Co.*, 687 F.3d 671, 675 (5th Cir. 2012), the Court held that "We agree with most of our sister circuits that the express adoption of these [AAA] rules presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." If there were no reasonable construction of the contract that allowed for arbitration, there would be nothing for an arbitrator to decide. However, there is in this case a plausible construction calling for arbitration. Thus, the question of whether the exception for actions seeking injunctive relief should be limited

to actions for an injunction in aid of arbitration or to enforce an arbitrator's award, should properly be left for the arbitrator to decide.

The case relied upon by Archer actually supports this analysis. In *State of New York v. Oneida Indian Nation of New York*, 90 F.3d 58, 62 (2nd Cir. 1996), the Court held that "While it is true that exclusionary clauses should not be given expansive readings, here the language excluding a certain class of disputes from arbitration was *clear and unambiguous*." (emphasis supplied). As shown above, that standard has not been met here.

The next question is whether non-signatory defendants can avail themselves of the arbitration clause. Both sides agree that *Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524 (5th Cir. 2000), is the controlling authority on the application of the doctrine of equitable estoppel in this circumstance, namely whether Archer is estopped from asserting the lack of privity against the non-signatory defendants who seek to compel arbitration.[2] In *Grigson*, the Fifth Circuit expressly adopted the Eleventh Circuit's test applying equitable estoppel to non-signatory parties seeking to compel arbitration of "intertwined" claims. That test provides:

> "Existing case law demonstrates that equitable estoppel allows a nonsignatory to compel arbitration in two different circumstances. *First, equitable estoppel applies when the signatory to a written agreement*

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[2] Because both sides agree that Grigson is controlling, the Court need not consider whether *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (U.S., 2009) would call for further analysis under state law.

> *containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory. When each of a signatory's claims against a nonsignatory makes reference to or presumes the existence of the written agreement, the signatory's claims arise out of and relate directly to the written agreement, and arbitration is appropriate. Second, application of equitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract. Otherwise the arbitration proceedings between the two signatories would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted."*

Id. at 527. (emphasis original). Both branches of the test appear to apply here. First, Archer has to rely on its written distributorship agreement with Pelton & Crane in order to allege that it was wrongfully excluded from the market (e.g., Complaint ¶ 32, Dkt. No. 1 at 10). Second, the conspiracy alleged between Schein and the Manufacturer Defendants alleges "substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract." Finally, the Court cannot presume that the defendants did act wrongfully, which would be necessary in order for equity or fairness to override the application of the doctrine in this instance.

Accordingly, the Motions to Compel Arbitration are granted and this action is stayed pending arbitration of the claims asserted herein. All parties are directed to notify the Court when the arbitration process is complete or if it has been abandoned.

SIGNED this 28th day of May, 2013.

/s/ Roy S. Payne
Roy S. Payne
United States Bankruptcy Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-41674

ARCHER AND WHITE SALES, INC.,

Plaintiff-Appellee

v.

HENRY SCHEIN, INC., DANAHER CORPORATION, INSTRUMENTARIUM DENTAL INC., DENTAL EQUIPMENT LLC, KAVO DENTAL TECHNOLOGIES LLC, AND DENTAL IMAGING TECHNOLOGIES CORPORATION,

Defendants-Appellants

Appeal from the United States District Court for the Eastern District of Texas

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Before HIGGINBOTHAM, GRAVES, and HIGGINSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that Defendants-Appellants' motion for stay pending appeal is **DENIED**.

No. 17-1272

In the Supreme Court of the United States

HENRY SCHEIN, INC., ET AL., PETITIONERS

v.

ARCHER AND WHITE SALES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a party is "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration" (9 U.S.C. 4), where the ultimate contention that the dispute is subject to arbitration is "[im]plausible," "without merit," and "wholly groundless."

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT

Petitioners are Henry Schein, Inc., Danaher Corporation, Instrumentarium Dental Inc., Dental Equipment LLC, Kavo Dental Technologies, LLC, and Dental Imaging Technologies Corporation, the appellants below and defendants in the district court.

Respondent is Archer and White Sales, Inc., the appellee below and plaintiff in the district court. Archer and White Sales, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

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In the Supreme Court of the United States

No. 17-1272

HENRY SCHEIN, INC., ET AL., PETITIONERS

v.

ARCHER AND WHITE SALES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

INTRODUCTION

According to petitioners, this case presents an important and recurring question that has divided the courts of appeals. But the court below decided only a "narrow" question with no widespread practical application. The issue arises only where a claimant lodges an arbitrability claim that is so baseless that the movant is not possibly "aggrieved," and the parties could not possibly have intended to endure a pointless detour for an arbitrator to confirm what everyone already knows: the dispute at issue is not even *plausibly* subject to arbitration. Indeed, the only time this issue will have any practical effect—aside from imposing undue burdens on parties and courts—is when an arbitrator would *disagree* with the ju-

diciary and declare an "implausible" argument the winner.[1] Whatever tiny subset of cases this affects (none are apparent) does not implicate an issue of sufficient importance to warrant this Court's review.

This narrow "exception" has been applied in various forms for decades without any obvious disturbance to the strong federal policy favoring arbitration. The Fifth Circuit—hardly known as a laggard when it comes to respecting arbitration rights—applied the same exception here, noting that it advances the parties' intent and avoids wasting judicial and party resources. The Fifth Circuit's ruling builds on the logic of other decisions, which likewise refuse to credit "meritless" arguments seeking arbitration, just as they refuse to credit baseless contentions on any other subject. The Federal Arbitration Act grants "aggrieved" parties a powerful mechanism for compelling arbitration, but it applies only where a counter-party fails or refuses to arbitrate under a written agreement. Where the movant's contentions are "frivolous" or "illegitimate," the movant is not "aggrieved" and has not established a counter-party's "failure to comply." No parties agree to subject themselves to frivolous claims. The Fifth Circuit's approach simply recognizes the good-faith inherent in all contracts and Congress's unwillingness to impose pointless burdens on parties and the courts.

This is perhaps why, contrary to petitioners' contention, there is no square circuit conflict. No court of appeals has rejected the "wholly groundless" exception in a case where the movant's argument was *actually* groundless, implausible, or frivolous, as it was found here; petitioners thus have failed to identify any square conflict on the facts

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[1] Even worse is the reality petitioners might imagine: arbitrators making mistakes and ordering arbitration of disputes that the parties contractually agreed would be decided in court.

presented. There is a compelling argument to wait and see whether any court of appeals would refuse to apply the "wholly groundless" exception when confronted with a truly frivolous and implausible claim.

While there assuredly is some theoretical disagreement among the courts of appeals, that disagreement is recent and will rarely arise given the narrowness of the "wholly groundless" exception. Had petitioners below raised *any* legitimate argument, the Fifth Circuit would have compelled arbitration. In such circumstances, there is no need for this Court to immediately grant review without any indication that the disagreement has any practical effect.

In any event, this case is a poor vehicle for deciding the question presented. The "wholly groundless" exception is relevant only when parties delegate the gateway arbitrability issue to the arbitrator, and that delegation must be established by "clear and unmistakable" evidence. Here, the Fifth Circuit has already concluded that (i) the agreement's language is ambiguous; (ii) any ambiguity must be construed against the drafter (here, petitioners); and (iii) there is a "strong argument" that the delegation does not apply to this dispute. The writing is on the wall. It would take a complete about-face for petitioners to avoid the same fate on remand, should this Court not simply affirm on that alternative ground. The straightest path to affirmance thus does not even involve deciding the question presented, and any answer to that question will prove wholly academic in this case.

These serious defects render this case unsuitable for further review. The petition should be denied.

STATUTORY PROVISIONS INVOLVED

In addition to those provisions reproduced in the petition, Section 4 of the Federal Arbitration Act, 9 U.S.C. 4, provides in pertinent part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. * * * The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. * * * If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue * * * .

STATEMENT

1. In August 2012, respondent commenced this action against Henry Schein, Inc., Danaher Corporation, and several of Danaher Corporation's subsidiaries: Instrumentarium Dental, Inc., Dental Equipment, LLC, KaVo Dental Technologies, LLC, and Dental Imaging Technologies Corporation. C.A. App. 16. Schein is a large wholesale distributor of dental equipment and supplies. *Id.* at

20. The other petitioners are major manufacturers of dental equipment and supplies. *Id.* at 19-20.[2]

Respondent is a small, family-owned distributor in the same industry. C.A. App. 21. Unlike its larger competitors, respondent uses elements of e-commerce to reduce its overhead and its prices. *Id.* at 21-22. Respondent alleges that Schein, Patterson, and Benco conspired to maintain supracompetitive margins by agreeing not to compete on price. *Id.* at 33-34. They enforce this conspiracy by boycotting low-margin distributors like respondent. *Ibid.* In particular, these distributors pressure major manufacturers, including certain petitioners here, to join the conspiracy by threatening to pull their products unless they stop working with low-margin distributors. *Ibid.* Because manufacturers are dependent on major distributors for sales, the manufacturers give in, as they did here, initially restricting respondent's sales territories and later terminating respondent's distributorships. *Ibid.*

Petitioners' conduct has prompted investigations by the FBI, the FTC, the Texas Attorney General, and the Arizona Attorney General, as well as an antitrust lawsuit brought by a class of dentists who had purchased overpriced dental products.[3]

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[2] Respondent amended its complaint in August 2017 to join as defendants two additional large distributors: Patterson Companies, Inc. and Benco Dental Supply Co.

[3] See Complaint, *In re Benco Dental Supply Co.*, FTC No. 9379 (Feb. 12, 2018); Agreed Final Judgment and Stipulated Injunction Between the State of Texas and Patterson Companies, Inc., *Texas* v. *Patterson Cos.*, No. D-1-GN-18-001916 (126th Judicial Dist. Apr. 19, 2018); Agreed Final Judgment and Stipulated Injunction Between the State of Texas and Henry Schein, Inc., *Texas* v. *Henry Schein, Inc.* No. D-1-GN-17-003749 (261st Judicial Dist. Aug. 3, 2017); Agreed Final Judgment and Stipulated Injunction Between the State of Texas and Benco Dental Supply, *Texas* v. *Benco Dental Supply Co.*,

After enduring this illegal conduct for years, respondent sued petitioners for violating the Sherman Act. Respondent sought both damages and "injunctive relief," because "[t]he violations * * * are continuing and will continue unless injunctive relief is granted." C.A. App. 35.

2. Shortly after respondent filed its original complaint, one petitioner, Dental Equipment, moved to compel arbitration under its distribution agreement with respondent, which authorized selling Pelton & Crane dental equipment. The agreement provided for arbitration of certain claims: "[a]ny dispute arising under or related to this Agreement (*except for actions seeking injunctive relief* and disputes relating to trademarks, trade secrets or other intellectual property of Pelton & Crane) shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association." C.A. App. 92 (emphasis added). The other petitioners then also requested arbitration; rather than invoke their own right to arbitrate, however, they argued that respondent was bound under equitable estoppel to arbitrate against everyone, even though its sole arbitration agreement was with Dental Equipment.[4]

In May 2013, the magistrate judge granted the motions and stayed the case. Pet. App. 39a-44a. The magistrate judge recognized that "the exception carved out for actions seeking injunctive relief is problematic to the motions to compel arbitration." *Id.* at 41a. And the magistrate judge further noted that "[i]f there were no reason-

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No. D-1-GN-15-001386 (353d Judicial Dist. Apr. 9, 2015); *In re Dental Supplies Antitrust Litig.*, No. 1:16-cv-00696 (E.D.N.Y.).

[4] Because Patterson and Benco had not yet been joined as parties, they did not seek to compel arbitration and did not participate in this interlocutory appeal.

able construction of the contract that allowed for arbitration, there would be nothing for an arbitrator to decide." *Ibid.* But the magistrate judge nevertheless felt that damages, not injunctive relief, was "the predominant relief sought," and it therefore concluded there was a "plausible construction" calling for arbitration. *Ibid.* Because the magistrate judge found that the agreement's adoption of the AAA rules implicitly delegated arbitrability issues to the arbitrator, it compelled arbitration. *Id.* at 4a.[5]

The magistrate judge next ruled that the "non-signatory defendants c[ould] avail themselves of the arbitration clause." Pet. App. 42a. In so ruling, the magistrate judge analyzed the Fifth Circuit's two-prong test for evaluating claims of equitable estoppel, and the judge rejected respondent's arguments under each prong of that test. *Id.* at 42a-43a.

Respondent filed an immediate "motion for reconsideration" of the magistrate judge's order. C.A. App. 444. The motion was fully briefed by early July 2013, but the case remained stayed until the district court sua sponte scheduled a status conference in October 2016. *Id.* at 626.[6]

3. The district court rejected the magistrate judge's ruling and denied petitioners' motions to compel arbitration. Pet. App. 18a-38a.

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[5] The magistrate judge did not identify any language in the contract supporting the view that the "predominant" relief was controlling or otherwise limiting the exception ("actions seeking injunctive relief") to mean anything other than what it plainly says. Pet. App. 39a-44a.

[6] The extended delay was the apparent result of confusion regarding whether respondent's motion sought reconsideration from the magistrate judge or review (in the form of objections) by the district court. See Pet. App. 20a. The district court construed the filing as "objections to the Order" and decided them accordingly. *Ibid.*

At the outset, the district court explained this Court's "'strong pro-court presumption'" on gateway issues of arbitrability. Pet. App. 23a (quoting *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 86 (2002)). Unlike the usual presumption in favor of arbitration, those gateway questions are reserved for "judicial determination [u]nless the parties clearly and unmistakably provide otherwise." *Ibid.* (quoting *Howsam*, 537 U.S. at 83) (internal quotation marks omitted).

The district court then conducted that analysis under the "narrow circumstances" here, and rejected the magistrate judge's ruling on "two independent rationales." Pet. App. 32a.[7]

First, the district court found the parties "did not clearly and unmistakably agree to arbitrate the arbitrability of actions seeking injunctive relief." Pet. App. 32a. As the court explained, the agreement's carve-out for such "actions" was "clear on its face." *Id.* at 27a. "[T]he arbitration clause here 'cabins application of the AAA rules to disputes "arising under or related to" the Agreement that are *not* "actions seeking injunctive relief" or "disputes relating to trademarks, trade secrets or other intellectual property of Pelton & Crane."'" *Id.* at 33a. It found petitioners' contrary reading violated the clause's "plain language," tried to "read" limitations into the agreement, and lacked "any substantive basis." *Id.* at 27a-28a. "Indeed," the court explained, "it would be senseless to have the AAA rules apply to proceedings that are not subject to arbitration." *Id.* at 34a.

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[7] The district court separately noted that "[t]here is no *express* delegation clause in the [A]greement," but followed Fifth Circuit authority holding that "the adoption of the AAA rules" is an implicit delegation to "'arbitrate arbitrability.'" Pet. App. 32a-33a.

The court thus concluded that the case "falls squarely within the clause excluding actions like this from arbitration," and it refused to "re-write the terms of the Parties' agreement to accommodate a party—notably, the party that drafted the agreement—that could have negotiated for more precise language." Pet. App. 30a, 34a (footnote omitted). That decision alone was a sufficient basis for rejecting petitioners' motion. *Id.* at 35a n.5 ("even if [the "wholly groundless"] test ha[d] not been adopted by the Fifth Circuit," "the Court finds that there is not clear and unmistakable evidence that the Parties intended to send the question of arbitrability to an arbitrator").[5]

Second, the court held that even had it found a clear and unmistakable delegation, petitioners would still lose "in these unique circumstances" under the Fifth Circuit's "narrow" exception for "'wholly groundless'" arbitrability claims. Pet. App. 34a-37a (quoting *Douglas* v. *Regions Bank*, 757 F.3d 460, 463-464 (5th Cir. 2014)). As the court explained, the Fifth Circuit's test reflects "'the parties' intent'": no one agrees to an "absurd[]" process where a plaintiff is compelled "to go to an arbitrator merely to have the arbitrator 'flatly' explain that the claim did not fall within the scope of the agreement and promptly send plaintiff back to court." *Id.* at 35a-36a. That was precisely the "unequivocal response" the court expected here: petitioners' argument was "wholly without merit" given the clause's "plain language," and it would be "senseless to refer the issue of arbitrability to the arbitrator, only to have the arbitrator read the plain language of the clause and then send the Parties back to this Court." *Id.* at 36a-37a.

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[5] The district court also highlighted that the "arbitration clause in this case is unique," and it "differs" from "standard arbitration clause[s] suggested by the [AAA]." Pet. App. 28a.

Without a "plausible" argument that the dispute was subject to arbitration, the "wholly groundless" exception applied under "the precise facts of this case." *Id.* at 38a.

In so ruling, the court stressed that this "narrow" exception was limited to "'exceptional' circumstances." Pet. App. 37a (quoting *Kubala* v. *Supreme Prod. Servs., Inc.*, 830 F.3d 199, 202 n.1 (5th Cir. 2016)). Indeed, the court explained, the rule "'is not a license for the court to prejudge arbitrability disputes more properly left to the arbitrator pursuant to a valid delegation clause,'" and any "'plausible' argument" is enough to require arbitration. *Ibid.* (quoting *Kubala*, 830 F.3d at 202 n.1). But given the utter implausibility of petitioners' arguments, the exception "is appropriate in this particular case." *Ibid.*[9]

4. a. Petitioners filed an interlocutory appeal, and respondent urged affirmance on each of the district court's independent grounds: "[t]he parties did not delegate the question of arbitrability to the arbitrator," and, even if they had, petitioners' "arbitrability argument is 'wholly groundless.'" Resp. C.A. Br. 17, 26.

b. The court of appeals affirmed. Pet. App. 1a-17a.

First, the court "ask[ed] if the parties 'clearly and unmistakably' delegated the issue of arbitrability." Pet. App. 6a. After examining the parties' contentions, it found a "strong argument" that the delegation clause does not apply to cases "within the [injunctive-relief] carve-out." *Id.* at 10a. It rejected petitioners' notion that "any mention in the parties' contract of the AAA Rules trumps all other contract language." *Ibid.* On the contrary, the court found, "the interaction between the AAA Rules and the

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[9] Having rejected petitioners' arguments on multiple grounds, the court elected not to decide a potential *additional* ground for denying arbitration: "whether the third parties to the arbitration clause in this case can enforce such arbitration clause." Pet. App. 37a-38a.

carve-out is at best ambiguous," and state law requires any ambiguity to be "'construed against the drafter[s]'"—here, petitioners. *Ibid.* (quoting *T.M.C.S., Inc.* v. *Marco Contractors, Inc.*, 780 S.E.2d 588, 597 (N.C. Ct. App. 2015)).

Despite these "strong" points against petitioners' reading, the court did not ultimately decide if the agreement somehow reflected a "clear and unmistakable" delegation. Pet. App. 10a-11a. Instead, the court found it sufficient to reject petitioners' reading under the "'wholly groundless' inquiry." *Id.* at 11a.[10]

In explaining that inquiry, the court emphasized the "wholly groundless" exception was a "narrow escape valve," and that arbitration should be compelled "'in almost all cases.'" Pet. App. 5a, 11a. While the doctrine's exact "contours" are "not yet fully developed," the court confirmed it does not apply if there is *any* "legitimate argument that th[e] arbitration clause covers the present dispute." *Id.* at 11a, 15a. It was only where the party's assertions are "[im]plausible" that the exception applies: "This limited inquiry allows the parties to avoid jumping through hoops to begin arbitration only to be sent directly back to the courthouse." *Id.* at 11a, 12a n.35.

Looking to the facts here, the court determined this was the rare case warranting the doctrine's application. Pet. App. 11a-16a. The court examined petitioners' arguments in favor of arbitrability and declared each had "no footing within the four corners of the contract." *Id.* at 16a. The court found the contract "'clear and unambiguous,'" and found the arbitration clause "expressly exclude[d] certain types of disputes." *Id.* at 12a-13a, 15a-16a. Like the district court, the court of appeals saw "no plausible

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[10] The court of appeals also noted the district court's observation that this arbitration clause has atypical language. Pet. App. 12a.

argument that the arbitration clause applies here to an 'action seeking injunctive relief." *Id.* at 16a; see also *id.* at 13a (repeating the district court's conclusion that petitioners' reading was "'wholly without merit'"). Petitioners' reading, in short, was at odds with "the clause's plain meaning." *Id.* at 16a.

The court of appeals concluded petitioners' arguments were "wholly groundless," and it thus affirmed the order denying petitioners' motion to compel arbitration. Pet. App. 16a-17a.

5. Both the district court and the court of appeals denied petitioners' requests for a stay pending appeal. Pet. App. 45a. The case proceeded through discovery and virtually all other pretrial phases and was set for trial on May 14, 2018. This Court then granted a stay (No. 17A859) pending its disposition of the petition for a writ of certiorari.

ARGUMENT

Petitioners argue that this case concerns an entrenched circuit conflict on a vitally important question. To the contrary, this case fails to implicate any square conflict; no court of appeals has refused to apply the "wholly groundless" exception when actually confronted with an implausible or frivolous claim. And the only two appellate decisions to criticize the exception arose just last year. There is every reason to let the issue percolate to see if those circuits are willing to endorse petitioners' wooden rule even when faced with frivolous or illegitimate arguments. And not only is this split illusory, but it is also unimportant. This "narrow" exception applies only in "exceptional" circumstances. Any plausible argument defeats the exception. Petitioners have not shown that its rare invocation precludes arbitration in any meaningful subset of cases, much less *improperly* so. Indeed, it is difficult to

think of many arbitrability arguments deemed "wholly groundless" by a court that would be endorsed by an arbitrator.

Nor would this be a suitable vehicle for deciding the question. The "wholly groundless" decision is academic if the parties did not delegate the gateway arbitrability issue. The district court so held below, and the Fifth Circuit left little doubt of its views; in fact, its discussion—finding "strong" arguments against delegation and declaring the clause "at best ambiguous"—are impossible to square with the "clear and unmistakable" standard. That means the Court can affirm in this case without reaching the question presented, and a failure to affirm would simply invite the court of appeals to reinstate the same judgment on remand. There is no merit to deciding the issue in this posture.

In any event, the decision below was correct. The FAA provides potent remedies for protecting arbitration. But a party is not "aggrieved" by a failure to arbitrate (9 U.S.C. 4) if there is no good-faith basis for arbitration. Likewise, a counter-party has not "fail[ed] to comply" with an arbitration clause (*ibid.*) if there is no plausible basis for reading the clause to cover the claims. The FAA's textual support for the "wholly groundless" exception reaffirms timeless principles of contract law: All contracts presume good-faith, and no one agrees to tolerate illegitimate, frivolous claims. Petitioners' contrary rule lacks a statutory hook in Section 4, and it invites the predictable waste of judicial and party resources. There is no indication that Congress set up arbitrability claims alone as immune from the basic principles of Rule 11.

Petitioners have failed to identify a direct conflict on an issue of substantial importance, or a vehicle where the answer to that question will have any practical effect. The petition should be denied.

A. There Is No Square Circuit Conflict, And Any Disagreement Between The Courts Of Appeals Is Recent And Insignificant

1. Contrary to petitioners' contention, there is neither a direct nor entrenched circuit conflict. The court of appeals below joined the Fourth, Sixth, and Federal Circuits in recognizing the "wholly groundless" exception. See *Simply Wireless, Inc.* v. *T-Mobile US, Inc.*, 877 F.3d 522 (4th Cir. 2017), petition for cert. pending, No. 17-1423 (filed Apr. 9, 2018); *Douglas* v. *Regions Bank*, 757 F.3d 460 (5th Cir. 2014); *Turi* v. *Main St. Adoption Servs., LLP*, 633 F.3d 496 (6th Cir. 2011); *Qualcomm Inc.* v. *Nokia Corp.*, 466 F.3d 1366 (Fed. Cir. 2006); see also *Local 205, United Elec., Radio & Mach. Workers of Am. (UE)* v. *Gen. Elec. Co.*, 233 F.2d 85, 101 (1st Cir. 1956). Petitioners maintain that the Tenth and Eleventh Circuits disavow that exception, but that is incomplete. In *Jones* v. *Waffle House, Inc.*, 866 F.3d 1257 (11th Cir. 2017), the court expressly found that the arbitrability claim was *not* "wholly groundless." And in *Belnap* v. *Iasis Healthcare*, 844 F.3d 1272 (10th Cir. 2017), the court stressed that the district court simply examined the arbitrability question on the merits, without asking whether the party's contention was baseless or (instead) plausible but simply mistaken.

There accordingly is no conflict at all where the facts, as here, show that the assertion of arbitrability is "wholly groundless" and lacks any plausible support. Because the issue was not factually presented in the Tenth and Eleventh Circuits, there is no guarantee how those courts would in fact respond to a frivolous or illegitimate arbitrability demand.

a. In *Jones*, the arbitration agreement covered "all claims and controversies ('claims'), past, present, or future, arising out of any aspect of or pertaining in any way

to [plaintiff's] employment." 866 F.3d at 1263. When the plaintiff sued for the defendant's failure to give him a copy of the background checks run in connection with his job application, the defendant moved to compel arbitration. *Id.* at 1261-1262.

In granting the defendant's motion, the Eleventh Circuit stated it was "declining to adopt what has come to be known as the wholly groundless exception." 866 F.3d at 1269. And, to be sure, it suggested the same position ought to hold "regardless of how frivolous the court may deem [the gateway issues] to be." *Id.* at 1270. Yet the court candidly acknowledged that, "even if we were to apply the wholly groundless exception, we would still conclude that [movant's] arguments were not wholly groundless." *Id.* at 1271 n.1. And, indeed, the court found that the agreement's "language [was] broad and could be read to include" plaintiff's claims. *Ibid.*[11]

The factual predicate for the issue was thus not presented. Time will tell whether *Jones*'s broad reasoning will hold in the face of wasteful, frivolous gateway issues.

b. Likewise, in *Belnap*, the parties had agreed to arbitrate "any dispute * * * arising under or related to th[e] Agreement" to develop a surgical center. 844 F.3d at 1274-1275. When the plaintiff brought suit, his complaint

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[11] The Eleventh Circuit reasoned that "[i]t's not for the courts to say the parties really didn't mean to [arbitrate gateway issues] in some circumstances, when the language they have employed allows for no such exceptions." 866 F.3d at 1270. This logic ignores the presumption of good-faith embedded in all contracts. Parties do not have to explicitly say they will arbitrate arbitrability *except* when the assertion is frivolous, *because it is already presumed that parties are not agreeing to invite frivolous claims*. The Eleventh Circuit's reasoning reflects an unrealistic view of ordinary conduct, and is inconsistent with basic contract-law principles.

made numerous references to the agreement and the proposed surgical center, and all of the causes of action were based on the same alleged misconduct and resulting harm. *Id.* at 1276-1277. When the defendants moved to compel arbitration, the district court did not reject their assertions as wholly groundless; on the contrary, the district court apparently ignored the delegation provision, and "proceeded to 'perform a preliminary analysis of all of the claims to determine if they fall within the scope of the contract.'" *Id.* at 1278.

The Tenth Circuit, unsurprisingly, held that the district court should have "compelled" all the claims to arbitration. *Id.* at 1279. And while it "decline[d] to adopt the 'wholly groundless' approach" (*id.* at 1286), there is no indication any claims were remotely groundless. Quite the opposite: on those facts, it was certainly plausible to argue that the broad arbitration clause (covering "any dispute * * * arising under or related to th[e] Agreement") applied.[12]

In short, given the facts in *Belnap* and *Jones*, those cases are not reliable indicators of what would necessarily happen if either court of appeals were confronted with an arbitrability argument that is unquestionably "groundless."

2. In any event, any disagreement in reasoning is not obviously entrenched. The purported split arose recently. The Tenth and Eleventh Circuit decisions issued last

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[12] The Tenth Circuit maintains its position is necessary "to effectuate the parties' intent regarding arbitration." 844 F.3d at 1286. This is question-begging: why would the parties, in this context alone, abandon the usual presumptions of good-faith? Is there any indication in the agreement that the parties intended to tolerate baseless assertions designed simply to force a needless, costly detour to an arbitrator before returning immediately to court? Like petitioners, the Tenth Circuit has no satisfactory response to these questions.

year, and it remains to be seen how those courts would apply those decisions to facts like the ones here. Nor is it clear those opinions reflect the final say of those courts; if a future panel did indeed endorse a truly frivolous arbitrability claim, it is entirely possible the full court would respond by taking up the issue en banc.

Moreover, as the court of appeals acknowledged, the "contours of the 'wholly groundless' exception [are] not yet fully developed." Pet. App. 15a. Additional percolation is likely to shed light on these questions. This Court should not devote its limited resources to resolving this issue before these additional developments have occurred.

3. In addition, petitioners overstate the practical significance of the purported split. The "wholly groundless" exception is a "narrow escape valve" (Pet. App. 11a); it applies only where the argument for arbitrability is "frivolous or otherwise illegitimate" (*Simply Wireless*, 877 F.3d at 529). The exception thus impacts very few cases. Indeed, even looking to the decisions constituting the "split," the Fourth Circuit discussed the "wholly groundless" exception before *ordering arbitration* (see *id.* at 528-29), and the Eleventh Circuit acknowledged it would have ordered arbitration even under the "wholly groundless" standard (*Jones*, 866 F.3d at 1270-71 & n.1). The same is generally true of other cases confronting the issue. In fact, respondent has identified only *four* other cases in which an appellate court has invoked the "wholly groundless" exception to refuse to order arbitration. *Douglas*, 757 F.3d at 464; *Turi*, 633 F.3d at 511; *Interdigital Commc'ns, LLC* v. *ITC*, 718 F.3d 1336 (Fed. Cir. 2013), vacated on other grounds, 134 S. Ct. 1876 (2014); *Evans* v. *Bldg. Materials Corp.*, 858 F.3d 1377, 1380 & n.1 (Fed. Cir. 2017) (accepting the "wholly groundless" standard for purposes

of the appeal because any contrary argument was waived).[13]

The practical effects are further minimized given the showing necessary to invoke the exception: ***the movant's argument must be baseless.*** Even without the exception, the overwhelming majority of disputes would simply end up back in court. There is no reason to presume any significant daylight between the views of arbitrators and the

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[13] Application of the "wholly groundless" exception is extraordinarily rare even in district court. In petitioners' reply in support of their stay application, petitioners claimed there are "numerous" district-court decisions denying motions to compel arbitration based on the "wholly groundless" exception. But of the ten cases that petitioners identified, three denied the motion to compel arbitration because the parties had not clearly and unmistakably delegated the arbitrability question to the arbitrator. See *Andrio* v. *Kennedy Rig Servs., LLC*, Civ. No. 17-1194, 2017 WL 6034125, at *1, *4 (S.D. Tex. Dec. 6, 2017) (holding that agreement to arbitrate "[a]ny controversy or claim arising out of or relating to *work performed by Contractor*" refers only to "a specific subject area, and it does not clearly and unmistakably include arbitrability") (emphasis added); *Matson Terminals, Inc.* v. *Ins. Co. of N. Am.*, Civ. No. 13-5571, 2014 WL 1219007, at *4 (N.D. Cal. Mar. 21, 2014) (explaining that "neither party contends that the parties agreed to arbitrate arbitrability"); *Ellsworth* v. *U.S. Bank, N.A.*, Civ. No. 12-2506, 2012 WL 4120003, at *7 (N.D. Cal. Sept. 19, 2012) (holding that the parties had not delegated arbitrability because "it is not clear and unmistakable that the procedural issue of who decides arbitrability 'concerns Ellsworth's account' within the meaning of the Deposit Agreement"). Another three do not use the phrase "wholly groundless" at all. See *In re FBI Wind Down, Inc.*, 557 B.R. 310, 325 (Bankr. D. Del. 2016); *Imperial Valet, Inc.* v. *Woodard*, Civ. No. 14-1585, 2015 WL 13158506 (D.D.C. Mar. 24, 2015); *Cornett* v. *Cmco Mortg., LLC*, Civ. No. 12-169, 2012 WL 12925599 (E.D. Ky. Nov. 9, 2012). If the remaining four cases are the best that petitioners can do, that only confirms the relative insignificance of this issue from a practical perspective.

judiciary; if the judiciary finds the argument utterly implausible or illegitimate, it is the unusual case where the arbitrator not only finds the issue close *but meritorious*.

And even in such a case, there is a distinct possibility that a reviewing court would later have grounds to vacate the arbitrator's decision because the arbitrators exceeded their power. See 9 U.S.C. 10. When the parties have agreed to submit a question—such as arbitrability—to an arbitrator, the court must still "ascertain[] whether the party seeking arbitration is making a claim which *on its face* is governed by the contract." *United Paperworkers Int'l Union* v. *Misco, Inc.*, 484 U.S. 29, 36-37 (1987) (emphasis added) (quoting *Steelworkers* v. *Am. Mfg. Co.*, 363 U.S. 564, 567-568 (1960)). A court may confirm an arbitrator's award only "as long as the arbitrator is *even arguably* construing or applying the contract and acting within the scope of his authority." *Id.* at 38 (emphasis added); see also *George Day Constr. Co.* v. *United Bhd. of Carpenters & Joiners, Local 354*, 722 F.2d 1471, 1476-1477 (9th Cir. 1984) (explaining that courts may affirm an arbitration award only "if on its face, the award represents a plausible interpretation of the contract").

By definition, a wholly groundless argument is not supportable on the arbitration agreement's face, nor is it a plausible interpretation of the agreement. Therefore an arbitrator accepting such an argument would *not* be arguably construing the agreement, and any subsequent arbitration award could well be vacated. See, *e.g.*, *Kalb* v. *Quixtar, Inc.*, No. 3:07-cv-1061, 2008 U.S. Dist. LEXIS 25015, at *18 (M.D. Fla. Mar. 28, 2008) ("[A] court may vacate an arbitration award 'where the arbitrators exceeded their powers.' 9 U.S.C. 10. If it is later determined that the claims are not arbitrable, any arbitration award may be vacated as exceeding the scope of the arbitration agreement."); *Holz-Her U.S., Inc.* v. *Monarch Mach.*,

Inc., No. 3:97CV56, 1998 U.S. Dist. LEXIS 15394, at *23-*24 (W.D.N.C. July 24, 1998) (holding that arbitrators exceeded their powers by deciding a matter that the parties had not agreed to submit to arbitration). At worst, then, the "wholly groundless" exception merely applies the principles of 9 U.S.C. 10 *before* the parties, arbitrators, and courts have wasted incredible time and resources associated with years of futile and useless arbitration proceedings. That is a benefit, not a concern.

At bottom, it will be the exceptionally rare case where the "wholly groundless" exception works to deprive litigants of a *legitimate* right to arbitrate; in the mine run of cases, it will simply deny a party's implausible effort to invoke a right it never had. A question with such little practical import does not warrant the Court's review.[14]

B. For Multiple Reasons, This Case Is A Poor Vehicle For Deciding The Question Presented

Even if the question presented warranted review, this would be an unsuitable vehicle for deciding it. As the lower courts made clear, this Court could affirm without even addressing the "wholly groundless" exception—indeed, the district court adopted an "independent" rationale that

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[14] Contrary to petitioners' contention (Pet. 22), there is no genuine concern of "'forum shopping.'" No rational party chooses a forum for litigating its entire case based on the minute risk that an opponent will lodge a baseless request to arbitrate and an arbitrator will reward that "wholly groundless" request. Indeed, even were petitioners to prevail, the predicate outcome would be a temporary, and wasteful, trip for the arbitrator to confirm that the case indeed belongs back in court. The far more realistic concern is that parties (under petitioners' rule) would assert groundless arbitration claims to force a detour to arbitration, driving up litigation costs and generating unwarranted delays. In any event, many agreements with arbitration clauses also have forum-selection clauses, which eliminate any concerns about "forum shopping."

supports the same judgment (Pet. App. 35a n.5), and the Fifth Circuit all but endorsed that alternative ground below (*id.* at 10a-11a). The arbitration clause itself is unusual, and its atypical features pose other obstacles for review.[15]

1. The language in this arbitration clause departs from standard arbitration agreements by including a carve-out. See Pet. App. 28a ("The arbitration clause in this case is unique."). The clause provides:

> Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets, or other intellectual property of Pelton & Crane), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association [(AAA)].

Pet. App. 3a. That language implicates two predicate questions before the "wholly groundless" issue becomes relevant, each concerning whether the parties even intended to delegate the gateway issue.

a. First, a court must decide whether the parties agreed to arbitrate any arbitrability dispute. Unlike an agreement to arbitrate the merits of a dispute, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 944 (1995) (quoting *AT&T Techs., Inc.* v. *Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986)). For that reason, before reaching the "wholly

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[15] In this respect, petitioners' question presented assumes the conclusion in stating this "agreement delegat[es] questions of arbitrability to an arbitrator." Pet. i. Petitioners lost on that argument in district court, and the shoe was poised to drop on the same point in the Fifth Circuit.

groundless" question, courts "first ask if the parties 'clearly and unmistakably' delegated the issue of arbitrability." Pet. App. 6a.

That inquiry is straightforward where the arbitration provision contains an express-delegation clause. See *Jones*, 866 F.3d at 1267; *Douglas*, 757 F.3d at 462 n.3. But it becomes more difficult where delegation is only implied. Several courts, including the Fifth Circuit, have held that a broad arbitration clause incorporating arbitral rules that themselves delegate arbitrability to the arbitrator (such as the AAA Rules) suffices as clear and unmistakable intent to delegate arbitrability. See Pet. App. 7a & n.21 (citing *Petrofac, Inc.* v. *DynMcDermott Petro. Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012)). This Court, however, has never considered implied delegation. And that issue is a logical predicate here to reaching the "wholly groundless" issue. If the parties did not delegate arbitrability questions, the court, not the arbitrator, must decide whether the dispute is arbitrable, regardless of whether the argument for arbitrability is "wholly groundless."

There is little benefit to taking up the question presented here, rather than awaiting a clean vehicle with an express-delegation clause or at least an implied delegation with fewer factual quirks.

b. Second, even if the parties agreed to arbitrate *some* arbitrability disputes, the express carve-out provision here presents further complications because the parties did not agree to arbitrate *this* arbitrability dispute. Compare *Qualcomm*, 466 F.3d at 1368 (agreement to arbitrate "[a]ny dispute, claim or controversy arising out of or relating to this Agreement"), and *Simply Wireless*, 877 F.3d at 525 (similar), with Pet. App. 3a (agreement to arbitrate "[a]ny dispute arising under or related to this Agreement (*except for actions seeking injunctive relief and disputes*

related to trademarks, trade secrets, or other intellectual property of Pelton & Crane)") (emphasis added).[16]

The parties below contested whether the express carve-out "removed the disputes from the ambit of both arbitration and the AAA Rules." Pet. App. 8a. The district court relied on the carve-out to hold that, in the unique context of this case, the arbitration agreement did not show a clear and unmistakable intent to delegate arbitrability. The court explained that "there is no reason to believe that incorporation of the AAA rules * * * should indicate a clear and unmistakable intention that the parties agreed to arbitrate the question of arbitrability * * * when an action falls squarely within the clause excluding actions like this from arbitration." *Id.* at 34a. Although the Fifth Circuit did not ultimately resolve the delegation question, its express rationale was unequivocal: (i) the agreement's language was "at best ambiguous";

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[16] Petitioners argued in their reply in support of their stay application that the implications of the carve-out were also for the arbitrator to decide. Reply 7-8. That gets the analysis exactly backwards. Before the arbitrator decides anything, the court must first determine whether the parties clearly and unmistakably agreed to delegate the arbitrability dispute to the arbitrator. Parties can agree to delegate only some arbitrability disputes to the arbitrator, just as they can agree to arbitrate only certain merits disputes. A simplified version of the arbitration clause could have read: "The parties will arbitrate disputes for money damages, with such arbitration being governed by AAA rules, unless the dispute also includes a claim for injunctive relief, in which case the dispute will be litigated in district court." Respondent's position is that such language does not clearly and unmistakably delegate to the arbitrator any issue (including arbitrability) having to do with an action seeking injunctive relief because the AAA rules apply only to disputes for money damages. To allow the arbitrator to decide the implications of the carve-out would be to shirk the court's duty to first locate clear and unmistakable intent to delegate arbitrability.

(ii) any ambiguity must be construed against the drafter (here, those *seeking* arbitration); and (iii) "[t]here is a strong argument" that any delegation does not apply to this dispute. *Id.* at 10a. The Court thus could affirm on this alternative ground (*rendering the question presented irrelevant*), or it could decide the question and remand for the Fifth Circuit, predictably, to affirm on this alternative ground (*rendering this Court's opinion irrelevant*).

2. This Court usually grants review in cases where its decision is outcome-determinative. It should await a vehicle where the question presented is not wholly academic.[17]

C. The Decision Below Was Correct

Review is also unwarranted because the court of appeals' decision was correct. Petitioners' contrary view is incompatible with the FAA's plain text, its animating purpose, traditional legal rules, and common sense.

1. Under 9 U.S.C. 4, the FAA authorizes parties "aggrieved" by the "failure, neglect, or refusal of another to arbitrate under a written agreement" to seek an order compelling arbitration. It further instructs courts to grant relief "upon being satisfied" of the counter-party's "failure to comply." 9 U.S.C. 4.

This provision provides an obvious textual basis for the "wholly groundless" exception. When an arbitration claim is utterly frivolous, the movant is not "aggrieved" and there is no possible "failure to comply." This is precisely what the "wholly groundless" inquiry seeks to tease out: if there is *any* plausible argument, the courts will

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[17] To further complicate matters, this series of questions resolves the arbitration question solely as to Dental Equipment LLC, the only petitioner who is a signatory to the arbitration agreement. The other petitioners, as non-signatories, would still need to rely on the doctrine of equitable estoppel to demand arbitration. See Resp. C.A. Br. at 40-49 (explaining why the doctrine is unsatisfied here). Neither the district court nor the court of appeals resolved that separate question.

compel arbitration. *Douglas*, 757 F.3d at 463; *Turi*, 633 F.3d at 511. But where a movant's claim is baseless or illegitimate, the court assuredly is not "satisfied" that the order compelling arbitration is appropriate. See *Qualcomm*, 466 F.3d at 1370, 1373 n.5. Petitioners cannot explain how parties are "aggrieved" simply because a litigant files a claim in court *that belongs in court*; and there is no cognizable prejudice from being denied the right to assert implausible claims or waste everyone's time with a pointless detour for an arbitrator to confirm the obvious. See, *e.g.*, *Douglas*, 757 F.3d at 463-464.[18]

2. These principles are consistent with the FAA's purpose and basic contract-law principles. "[A]rbitration is a matter of contract" (*Rent-A-Center, W., Inc.* v. *Jackson*, 561 U.S. 63, 67 (2010)), and no contract implicitly authorizes parties to act in bad faith. A delegation clause reflects the parties' agreement to resolve *legitimate* arbitrability issues before an arbitrator; it is not a license for the other side to subject a party to frivolous claims. See *McCarroll* v. *L.A. County Dist. Council of Carpenters*, 315 P.2d 322, 333 (Cal. 1957); cf. *Bell* v. *Hood*, 327 U.S. 678, 682-683 (1946) (refusing to exercise federal jurisdiction where a federal claim is "wholly insubstantial and frivolous").

The "wholly groundless" test simply honors "'the parties' intent'":

> When [plaintiff] signed the arbitration agreement containing a delegation provision, did she intend to go

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[18] There is no textual basis, however, for refusing to compel arbitration because the underlying *claims* are frivolous. That is one reason the "wholly groundless" exception is perfectly consistent with decisions like *AT&T Techs., Inc.* v. *Comm'cns Workers of Am.*, 475 U.S. 643 (1986). See 475 U.S. at 649-650 (requiring arbitration "whether the claims of the party seeking arbitration are 'arguable' or not, indeed even if it appears to the court to be frivolous").

> through the rigmaroles of arbitration just so the arbitrator can tell her in the first instance that her claim has nothing whatsoever to do with her arbitration agreement, and she should now feel free to file in federal court? Obviously not.

Douglas, 757 F.3d at 464. Contract law ultimately seeks to identify a meeting of the minds. There is no conceivable meeting of the minds that justifies the lodging of baseless arbitration demands—and that is true even if the contract does not explicitly state the obvious. Contrary to petitioners' contention, the FAA does not impose an absolutist, wooden regime divorced from common sense: "If the argument that the claim at hand is within the scope of the arbitration agreement is 'wholly groundless,' surely [the parties] never intended that such arguments would see the light of day at an unnecessary and needlessly expensive gateway arbitration." *Ibid.*

3. Petitioners' arguments are also at odds with basic litigation norms. As reflected in Fed. R. Civ. P. 11, no one is entitled to file bad-faith, frivolous, or harassing claims. An attempt to force a party to arbitrate arbitrability where the arbitration clause indisputably does not apply fits squarely within such prohibited conduct. See, *e.g.*, *Simply Wireless*, 877 F.3d at 528-529 (drawing the parallel to Rule 11, and holding that "a district court need not, and should not, enforce a delegation provision when a party's assertion that a claim falls within an arbitration clause is frivolous or otherwise illegitimate"). There is no indication that Congress intended to exempt the FAA from the general rules applicable to all other litigation practice.

Refusing to compel arbitration where the arbitration claim is wholly groundless—where the parties never genuinely thought an arbitrator would decide the dispute—"enforce[s] [the agreement] according to [its] terms,"

Rent-A-Center, 561 U.S. at 67; *Douglas*, 757 F.3d at 464. Nothing in law or logic requires courts and parties to tolerate (indeed, *promote*) the wasteful actions of parties filing frivolous arbitration demands. The decision below was correct, and further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2018

No. 17-1272

In the Supreme Court of the United States

HENRY SCHEIN, INC., ET AL., PETITIONERS

v.

ARCHER AND WHITE SALES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

In opposing certiorari, respondent presents a warmed-over version of the same arguments it made in unsuccessfully opposing petitioners' application for a stay. Try as it might, respondent cannot deny the existence of a clear and expressly recognized conflict on the question presented. And while respondent halfheartedly argues that this case is a poor vehicle in which to consider that question, respondent fails to identify any valid obstacle to the Court's review. The conflict on the question presented demands the Court's immediate attention.

The remainder of respondent's brief reads more like a dress rehearsal for its arguments on the merits than a traditional opposition to certiorari. Respondent is of course

free to advance those arguments if the Court grants review. For now, it suffices to note that respondent's analysis of the merits simply underscores the need for this Court to reaffirm the "liberal federal policy favoring arbitration agreements," *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 24 (1983), and to ensure that parties such as petitioners retain their bargained-for contractual rights. This case is an obvious candidate for further review, and the petition for a writ of certiorari should be granted.

1. Respondent strains credulity when it denies that a circuit conflict exists on the question whether the Federal Arbitration Act permits a court to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes the claim of arbitrability is "wholly groundless." See Br. in Opp. 14-20.

a. Respondent first protests that the Tenth and Eleventh Circuits did not actually do what they said they were doing when they categorically rejected the "wholly groundless" exception as a matter of law. See Br. in Opp. 14-16. But those courts could not have been clearer. The Tenth Circuit stated that, "[h]aving thoroughly considered its merits, we decline to adopt the 'wholly groundless' approach." *Belnap* v. *Iasis Healthcare*, 844 F.3d 1272, 1286 (10th Cir. 2017). And the Eleventh Circuit was equally direct, "join[ing] the Tenth Circuit in declining to adopt what has come to be known as the wholly groundless exception." *Jones* v. *Waffle House, Inc.*, 866 F.3d 1257, 1269 (11th Cir. 2017). Those decisions squarely conflict with decisions from the Fourth, Fifth, Sixth, and Federal Circuits adopting the exception. See, *e.g.*, *Simply Wireless, Inc.* v. *T-Mobile US, Inc.*, 877 F.3d 522, 528 n.5

(4th Cir. 2017) (recognizing the conflict), petition for cert. pending, No. 17-1423 (filed Apr. 9, 2018).[1]

b. In the face of that expressly recognized conflict, respondent doggedly maintains that the conflict is "illusory" because (at least in respondent's opinion) the Tenth and Eleventh Circuits did not "truly" confront arbitrability claims that were "unquestionably 'groundless.'" Br. in Opp. 3, 16. In so contending, however, respondent badly misjudges the breadth of the holdings in *Belnap* and *Jones*. In both cases, the courts of appeals explicitly and categorically rejected *any* application of the "wholly groundless" exception. The outcome of those cases did not hinge on their particular facts; instead, the courts correctly concluded that, upon finding a delegation of arbitrability to the arbitrator, a district court's job was complete, regardless of the court's views on the merits of the arbitrability issue. See *Jones*, 866 F.3d at 1271; *Belnap*, 844 F.3d at 1287.[2] Whether the particular disputes were within the scope of the arbitration provisions at issue thus

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[1] Although the Fifth Circuit did not cite the Tenth and Eleventh Circuits' decisions in its opinion, it was plainly aware of them. See C.A. Oral Arg. at 9:15 (June 7, 2017) <tinyurl.com/ca5argument> (Higginson, J.) ("Then you get to the legal arguments, and you may be right, *Douglas* may just be wrong. There is a pretty healthy split."); *id.* at 34:43 (Higginson, J.) ("*Qualcomm* started the wholly groundless exception. * * * Are you aware of any cert activity? Because there is a split, a clear split, and now we have been living with it for a while.").

[2] To the extent that the Eleventh Circuit went on to address in a footnote whether the defendant's claim of arbitrability was "wholly groundless," that discussion was dictum. See *Jones*, 866 F.3d at 1271 n.1 (stating that, "*even if* we were to apply the wholly groundless exception, we would still conclude that [the moving party's] arguments were not wholly groundless" (emphasis added)). The court's unequivocal rejection of the "wholly groundless" exception plainly constituted its holding.

had no bearing on the outcome in either case. Because there is a resulting conflict on the legal question of the validity of the "wholly groundless" exception, further review is warranted.

c. Respondent timidly contends that the circuit conflict is "not obviously entrenched," suggesting that the Tenth and Eleventh Circuit decisions rejecting the "wholly groundless" exception may not "reflect the final say of those courts." Br. in Opp. 16-17. Of course, it is fairly rare, if not unheard of, for the Court to await further percolation in a case presenting a 4-2 circuit conflict.

In any event, the prospect of the Tenth and Eleventh Circuits *both* reversing themselves is remote, especially given the limitations on appellate review. In the wake of *Belnap* and *Jones*, district courts in those circuits must send disputes to arbitration upon finding a delegation of arbitrability to the arbitrator. Because there is no right to interlocutory review of such a decision, see 9 U.S.C. 16(b), it is unlikely that either court of appeals will even have the opportunity to revisit the validity of the "wholly groundless" exception, much less decide to do so en banc. There is thus no realistic possibility that the existing conflict will resolve itself without this Court's intervention; if anything, the conflict will only grow deeper, with even greater uncertainty for parties to arbitration agreements, as the remaining courts of appeals pick sides.

What is more, there would be no benefit to further percolation, because it would not assist the Court in deciding whether the "wholly groundless" exception is consistent with the FAA. The arguments for and against recognizing the "wholly groundless" exception have been "thoroughly considered" in opinions from six courts of appeals, *Belnap*, 844 F.3d at 1286, including a vigorous dissent from the Fifth Circuit's decision adopting respondent's

position, see *Douglas* v. *Regions Bank*, 757 F.3d 460, 464 (5th Cir. 2014) (opinion of Dennis, J.).

As matters currently stand, whether delegation provisions in arbitration agreements are always enforceable depends on the location of the parties. The resulting inconsistency for parties to arbitration agreements is intolerable, and the entrenched conflict on the validity of the "wholly groundless" exception cries out for the Court's immediate review.

2. Respondent seeks to minimize the significance of the "theoretical disagreement" among the courts of appeals by stressing the purported narrowness of the "wholly groundless" exception. See Br. in Opp. 3, 17-20. But the facts of this case belie any suggestion that the "wholly groundless" exception applies only where the argument for arbitrability is "frivolous or otherwise illegitimate." *Id.* at 17. The magistrate judge initially compelled arbitration on the ground that there was a "plausible construction [of the arbitration provision] calling for arbitration." Pet. App. 41a-42a. Yet the district court and court of appeals, applying the "wholly groundless" exception, reached a different conclusion. See *id.* at 15a-16a, 34a-37a.

This case therefore perfectly illustrates the practical consequences of the "wholly groundless" exception: it usurps parties' bargained-for rights to have arbitrability determined by an arbitrator. And while respondent is correct not to "presume any significant daylight between the views of arbitrators and the judiciary," Br. in Opp. 18-19, the conclusion it draws from that premise is exactly backward. The FAA assumes that arbitrators are "competent, conscientious, and impartial." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985). Where the parties have agreed that the arbitra-

tors will decide arbitrability, the "liberal federal policy favoring arbitration agreements," *Moses H. Cone*, 460 U.S. at 24, requires that the parties' intention be given effect. The judge-made "wholly groundless" exception overrides the parties' agreement and thereby flouts both the FAA and this Court's long line of decisions interpreting it.

As a result of the "wholly groundless" exception, moreover, parties across the country are being forced to spend significant time and money litigating in federal court, rather than enjoying the efficient, economical dispute-resolution procedure for which they bargained. Preventing that needless waste of resources is yet another reason for the Court to grant review, as this case starkly demonstrates. If the magistrate judge's order had only been followed, the arbitrator could have resolved arbitrability and then the merits of the dispute long ago. Instead, this case has wended its way through multiple layers of the federal court system, with arbitrability still left unresolved nearly six years later. Far from promoting efficiency, therefore, the "wholly groundless" exception undermines it.

3. Respondent briefly contends that this case is a poor vehicle for resolving the circuit conflict over the "wholly groundless" exception. See Br. in Opp. 20-24. That contention—which respondent also made in opposing petitioners' stay application, see Opp. to Appl. 14-18—lacks merit.

a. To begin with, respondent is plainly wrong in asserting that addressing the question presented would require the Court first to decide whether the applicable agreements delegated questions of arbitrability to the arbitrator. See Br. in Opp. 21-22. As respondent acknowledges, the court of appeals declined to resolve that question in the decision below, relying instead on the "wholly groundless" exception. See Pet. App. 10a-11a. This Court

can do the same. Whether the "wholly groundless" exception is consistent with the FAA is a pure question of law, and there is no threshold obstacle to reviewing and resolving that question in this case.

In any event, respondent's argument that no valid delegation exists wholly lacks merit. The arbitration clauses at issue expressly incorporate the rules of the American Arbitration Association (AAA), which unambiguously provide that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, *scope* or validity of the arbitration agreement." C.A. App. 118 (emphasis added). As noted in the petition (at 5), every court of appeals to have considered the question has held that the incorporation of AAA rules evinces a sufficiently clear intent to delegate questions of arbitrability to an arbitrator. See *Belnap*, 844 F.3d at 1284-85 & n.7 (collecting cases).

b. In apparent recognition of that well-established rule, respondent argues that, to the extent the arbitration clauses at issue incorporate AAA rules, they do not apply here in light of the carve-out for "actions seeking injunctive relief." See Br. in Opp. 22-24. But that is the very arbitrability question that, in petitioners' view, the arbitrator should have been permitted to decide: namely, "whether [the parties'] agreement cover[ed] [the] particular controversy" at issue. *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 68-69 (2010).

In any event, the better view is that, where an arbitration provision contains a carve-out for injunctive relief, it merely permits a court to award injunctive relief either on a preliminary basis to preserve the status quo *pending* arbitration, or on a permanent basis *after* the plaintiff secures an arbitration award in its favor. See, *e.g.*, *Lawrence* v. *Comprehensive Business Services*, 833 F.2d 1159,

1163 (5th Cir. 1987); *Sauer-Getriebe KG* v. *White Hydraulics, Inc.*, 715 F.2d 348, 350 (7th Cir. 1983), cert denied, 464 U.S. 1070 (1984); *Erving* v. *Virginia Squires Basketball Club*, 468 F.2d 1064, 1067 (2d Cir. 1972). Such a carve-out does not obliterate a party's right to arbitrate whenever a claimant engrafts a request for injunctive relief onto its underlying claim for damages. Especially given the magistrate judge's analysis, see Pet. App. 40a-41a, this is certainly not a case in which the question presented is "wholly academic" because an arbitrator would necessarily conclude that the dispute was not arbitrable. Br. in Opp. 24.

In short, as the Court presumably considered in deciding to grant petitioners' application for a stay, this case is a suitable vehicle in which to decide whether the "wholly groundless" exception is consistent with the FAA—a pure question of law that formed the sole basis of the decision below. Further review is warranted.[3]

4. Respondent devotes the remainder of its brief in opposition to defending the court of appeals' decision on the merits. See Br. in Opp. 24-27. As we have already

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[3] We are aware of two other currently pending petitions for certiorari that present questions concerning the "wholly groundless" exception, both filed by parties *opposing* arbitration. See *IQ Products Co.* v. *WD-40 Co.*, petition for cert. pending, No. 17-986 (filed Jan. 10, 2018); *Simply Wireless*, *supra*, No. 17-1423 (filed Apr. 9, 2018). In each of those cases, however, the court of appeals accepted the existence of the "wholly groundless" exception but concluded that the moving party's claim for arbitration was *not* "wholly groundless" (and thus remitted the dispute to arbitration). See Pet. at i, *IQ Products*, *supra*; Pet. at i, *Simply Wireless*, *supra*. As a result, the question on which the courts of appeals are divided—whether the "wholly groundless" exception is consistent with the FAA—would not be dispositive in either case, since the petitioners lost even under the more favorable legal rule. The Court should therefore either deny those petitions or, at most, hold them pending its decision in this case.

explained, the "wholly groundless" exception has no basis in the text of the FAA. See Pet. 15-20. We make just two additional points here and leave fuller responses to subsequent merits briefing if certiorari is granted.

a. Respondent claims to locate an "obvious" textual basis for the "wholly groundless" exception in Section 4 of the FAA. See Br. in Opp. 24-25. That provision authorizes courts to grant an order compelling arbitration to an "aggrieved" party "upon being satisfied" that the non-moving party has "fail[ed] to comply" with the agreement requiring arbitration. 9 U.S.C. 4. Tellingly, respondent did not make that supposedly "obvious" textual argument below. Nor did respondent advance that argument when it addressed the merits in opposing petitioners' stay application. See Opp. to Appl. 18-23.

In any event, respondent's textual argument lacks merit. Section 4 merely describes the minimal showing that a party seeking to compel arbitration must make in order to establish standing and entitlement to relief under the FAA—*i.e.*, that there is an agreement to arbitrate, that the moving party wishes to arbitrate, and that the non-moving party has refused to do so. Nowhere does Section 4 mandate a further inquiry into whether the movant's claim for arbitration is "baseless or illegitimate." Br. in Opp. 25. Respondent's interpretation of Section 4 would upend the principle that parties may "agree to arbitrate 'gateway' questions of 'arbitrability,'" *Rent-A-Center*, 561 U.S. at 68-69, and disrupt the settled expectations of countless parties such as petitioners that seek to enforce bargained-for delegation provisions.

b. Respondent further argues that the "wholly groundless" exception is necessary to effectuate the parties' intent to arbitrate only "legitimate" questions concerning arbitrability. Br. in Opp. 25 (emphasis omitted).

In making that argument, however, respondent unwittingly underscores the danger the "wholly groundless" exception poses to the enforceability of commercial arbitration agreements. By design, the "wholly groundless" test requires courts to consider arbitrability in the first instance even in those cases—such as this one—in which there *is* a legitimate argument concerning arbitrability. See Pet. App. 41a (magistrate judge's conclusion that there is a "plausible construction [of the arbitration provision] calling for arbitration"). It thereby expands a district court's role beyond that sanctioned by the FAA. If parties agree that an arbitrator will decide arbitrability, the FAA mandates that courts "*shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 218 (1985).

By permitting courts to disregard provisions delegating questions of arbitrability to an arbitrator, the "wholly groundless" exception betrays the "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp.*, 473 U.S. at 631. And if the decision below is allowed to stand, the number of cases in which parties lose their bargained-for right to arbitration will only continue to grow. The Court should intervene to correct that decision and resolve a circuit conflict that is affecting arbitration agreements across the country.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JOINT APPENDIX
(VOLUME 1; PAGES 1-117)

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Counsel of Record
for Respondents

PETITION FOR A WRIT OF CERTIORARI FILED: MARCH 9, 2018
CERTIORARI GRANTED: JUNE 25, 2018

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The following opinions, decisions, judgments, and orders have been omitted in printing the joint appendix because they appear as appendices to the petition for certiorari as follows:

Appendix A:	Court of appeals opinion, Dec. 21, 2017
Appendix B:	District court memorandum opinion, Dec. 7, 2016
Appendix C:	Magistrate judge memorandum order, May 28, 2013
Appendix D:	Court of appeals order, Dec. 21, 2017

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-41674

ARCHER AND WHITE SALES, INCORPORATED,
Plaintiff-Appellee,

v.

HENRY SCHEIN, INCORPORATED,
Defendant-Appellant.

DOCKET ENTRIES

DATE	PROCEEDINGS
12/14/2016	PRIVATE CIVIL FEDERAL CASE docketed. NOA filed by Appellants Danaher Corporation, Dental Equipment L.L.C., Dental Imaging Technologies, Corporation, Instrumentarium Dental Incorporation and KaVo Dental Technologies, L.L.C. [16-41674] (LCA)
	* * * * *
02/01/2017	OPPOSED JOINT STIPULATION filed by Appellant Henry Schein, Incorporated, and Appellants Danaher Corporation, Dental Equipment, L.L.C., Dental

	Imaging Technologies, Corporation, Instrumentarium Dental, Incorporation and KaVo Dental Technologies, L.L.C. for stay pending appeal [8415466-2]. Date of Service: 02/01/2017. Response/Opposition due on 02/13/2017. [16-41674] REVIEWED AND/OR EDITED - The original text prior to review appeared as follows: OPPOSED MOTION filed by Appellants Danaher Corporation, Dental Equipment, L.L.C., Dental Imaging Technologies, Corporation, Instrumentarium Dental, Incorporation and KaVo Dental Technologies, L.L.C. *and Henry Schein* to stay district court proceedings [8415466-2]. Date of service: 02/01/2017 via email - Attorney for Appellants: Chuck Fontecilla, Kruse, Ondeck, Pitt, Schuster, Timms; Attorney for Appellees: Brumbaugh, Pope [16-41674] (Layne E. Kruse)
02/01/2017	EXHIBITS IN SUPPORT of motion for stay pending appeal [8415466-2] filed by Appellants Danaher Corporation, Dental Equipment, L.L.C., Dental Imaging Technologies, Corporation, Henry Schein, Incorporated, Instrumentarium Dental, Incorpo-

	ration and KaVo Dental Technologies, L.L.C. Date of Service: 02/01/2017 [16-41674] (CAG)
02/10/2017	ELECTRONIC RECORD ON APPEAL FILED. Exhibits on File in District Court? No. Electronic ROA deadline satisfied. [16-41674] (MRB)
	* * * * *
02/13/2017	RESPONSE/OPPOSITION filed by Archer and White Sales, Incorporated [8423713-1] to the motion for stay pending appeal filed by Appellants Danaher Corporation, Instrumentarium Dental, Incorporation, Dental Equipment, L.L.C., KaVo Dental Technologies, L.L.C., Dental Imaging Technologies, Corporation and Henry Schein, Incorporated in 16-41674 [8415466-2]. Response/Opposition deadline satisfied. Date of Service: 02/13/2017. [16-41674] REVIEWED AND/OR EDITED - The original text prior to review appeared as follows: RESPONSE/OPPOSITION filed by Archer and White Sales, Incorporated [8423713-1] to the motion for stay pending appeal filed by Appellants Danaher Corporation, Instrumentarium Dental, Incorporation, Dental Equipment,

	L.L.C., KaVo Dental Technologies, L.L.C., Dental Imaging Technologies, Corporation and Henry Schein, Incorporated in 16-41674 [8415466-2] Date of Service: 02/13/2017 via email - Attorney for Appellants: Chuk, Fontecilla, Kruse, On for Appellees: Brumbaugh, Pope. [16-41674] (Kay Lynn Brumbaugh)
02/13/2017	EXHIBITS IN SUPPORT of response/opposition [8423713-2] and White Sales, Incorporated. Date of Service: 02/13/2017 [16-41674] (CAG)
02/15/2017	REPLY filed by Appellants Danaher Corporation, Dental Equipment, L.L.C., Dental Imaging Technologies, Corporation, Instrumentarium Dental, Incorporation and KaVo Dental Technologies, L.L.C. *and Henry Schein, Inc.* [8427337-1] to the response/opposition filed by Appellee Archer and White Sales, Incorporated in 16-41674 [8423713-2]. Date of Service: 02/15/2017 via email - Attorney for Appellants: Chuk, Fontecilla, Kruse, Ondeck, Pitt, Schuster, Timms; Attorney for Appellees: Brumbaugh, Pope. [16-41674] (Layne E. Kruse)
02/21/2017	LETTER filed referencing motion for stay pending appeal filed

by Appellants Danaher Corporation, Instrumentarium Dental, Incorporation, Dental Equipment, L.L.C., KaVo Dental Technologies, L.L.C., Dental Imaging Technologies, Corporation and Henry Schein, Incorporated in 16-41674 [8415466-2]. [16-41674] REVIEWED AND/OR EDITED - The original text prior to review appeared as follows: SUPPLEMENTAL AUTHORITIES (FRAP 28j) FILED by Appellants Danaher Corporation, Dental Equipment, L.L.C., Dental Imaging Technologies, Corporation, Instrumentarium Dental, Incorporation and KaVo Dental Technologies, L.L.C. Date of Service: 02/21/2017 via email - Attorney for Appellants: Chuk, Fontecilla, Kruse, Ondeck, Pitt, Schuster, Timms; Attorney for Appellees: Brumbaugh, Pope [16-41674] (Layne E. Kruse)

02/23/2017 LETTER filed by Archer and White Sales, Incorporated in response to letter filed by Appellants Danaher Corporation, Instrumentarium Dental, Incorporation, Dental Equipment, L.L.C., KaVo Dental Technologies, L.L.C. and Dental Imaging Technologies, Corporation in 16-

41674 [8431301-2]. [16-41674] REVIEWED AND/OR EDITED - The original text prior to review appeared as follows: RESPONSE/OPPOSITION filed by Archer and White Sales, Incorporated [8433381-1] to the 28j letter filed by Appellants Danaher Corporation, Instrumentarium Dental, Incorporation, Dental Equipment, L.L.C., KaVo Dental Technologies, L.L.C. and Dental Imaging Technologies, Corporation in 16-41674 [8431301-2] Date of Service: 02/23/2017 via email - Attorney for Appellants: Chuk, Fontecilla, Kruse, Ondeck, Pitt, Schuster, Timms; Attorney for Appellees: Brumbaugh, Pope. [16-41674] (Cameron Phair Pope)

02/24/2017 COURT ORDER carrying with the case motion for stay pending appeal filed by Appellants Danaher Corporation, Instrumentarium Dental, Incorporation, Dental Equipment, L.L.C., KaVo Dental Technologies, L.L.C., Dental Imaging Technologies, Corporation and Henry Schein, Incorporated [8415466-2]; [8434561-2] Judge(s): JES, JLD and LHS. [16-41674] (AS)

02/24/2017 COURT DIRECTIVE ISSUED expediting briefing. Appellants'

brief adjusted to be due 03/17/2017. Appellee's brief is due 4/11/17. Any reply would be due 4/21/17. [8434610-2] [16-41674] (AS)

* * * * *

03/17/2017 APPELLANT'S BRIEF FILED # of Copies Provided: 0 A/Pet's Brief deadline satisfied. Paper Copies of Brief due on 03/27/2017 for Appellants Danaher Corporation, Dental Equipment, L.L.C., Dental Imaging Technologies, Corporation, Henry Schein, Incorporated, Instrumentarium Dental, Incorporation and KaVo Dental Technologies, L.L.C.. [16-41674] REVIEWED AND/OR EDITED - The original text prior to review appeared as follows: APPELLANT'S BRIEF FILED by Danaher Corporation, Dental Equipment, L.L.C., Dental Imaging Technologies, Corporation, Instrumentarium Dental, Incorporation and KaVo Dental Technologies, L.L.C.. *and by Henry Schein, Inc.* Date of service: 03/17/2017 via email - Attorney for Appellants: Chuk, Fontecilla, Kruse, Ondeck, Pitt, Schuster, Timms; Attorney for Appellees: Brumbaugh, Pope [16-41674] (Jonathan Bradley Pitt)

03/17/2017	RECORD EXCERPTS FILED. # of Copies Provided: 0 Paper Copies of Record Excerpts due on 03/27/2017 for Appellants Danaher Corporation, Dental Equipment, L.L.C., Dental Imaging Technologies, Corporation, Henry Schein, Incorporated, Instrumentarium Dental, Incorporation and KaVo Dental Technologies, L.L.C.. [16-41674] REVIEWED AND/OR EDITED - The original text prior to review appeared as follows: RECORD EXCERPTS FILED by Appellants Danaher Corporation, Dental Equipment, L.L.C.,Dental Imaging Technologies, Corporation, Instrumentarium Dental, Incorporation and KaVo Dental Technologies, L.L.C.. *and by Henry Schein, Inc.* Date of service: 03/17/2017 via email - Attorney for Appellants: Chuk, Fontecilla, Kruse, Ondeck, Pitt, Schuster, Timms; Attorney for Appellees: Brumbaugh, Pope [16-41674] (Jonathan Bradley Pitt)

* * * * *

04/11/2017	APPELLEE'S BRIEF FILED # of Copies Provided: 0 E/Res's Brief deadline satisfied. Paper Copies of Brief due on 04/17/2017 for Appellee Archer and White

Sales, Incorporated. [16-41674] REVIEWED AND/OR EDITED - The original text prior to review appeared as follows: APPELLEE'S BRIEF FILED by Archer and White Sales, Incorporated. Date of service: 04/11/2017 via email - Attorney for Appellants: Chuk, Fontecilla, Govett, Kruse, Montgomery, Ondeck, Pitt, Schuster, Timms; Attorney for Appellees: Brumbaugh, Pope [16-41674] (Kay Lynn Brumbaugh)

* * * * *

04/21/2017 APPELLANT'S REPLY BRIEF FILED # of Copies Provided: 0 Reply Brief deadline satisfied. Paper Copies of Brief due on 05/01/2017 for Appellants Danaher Corporation, Dental Equipment, L.L.C., Dental Imaging Technologies, Corporation, Henry Schein, Incorporated, Instrumentarium Dental, Incorporation and KaVo Dental Technologies, L.L.C. [16-41674] REVIEWED AND/OR EDITED - The original text prior to review appeared as follows: APPELLANT'S REPLY BRIEF FILED by Danaher Corporation, Dental Equipment, L.L.C., Den-

tal Imaging Technologies, Corporation, Instrumentarium Dental, Incorporation and KaVo Dental Technologies, L.L.C.. *and Henry Schein, Inc.* Date of service: 04/21/2017 via email - Attorney for Appellants: Chuk, Fontecilla, Govett, Kruse, Montgomery, Ondeck, Pitt, Schuster, Timms; Attorney for Appellees: Brumbaugh, Pope [16-41674]
(Liam James Montgomery)

* * * * *

06/07/2017 ORAL ARGUMENT HEARD before Judges Higginbotham, Graves, Higginson. Arguing Person Information Updated for: Lewis T. LeClair arguing for Appellee Incorporated Archer and White Sales; Arguing Person Information Updated for: Jonathan Bradley Pitt arguing for Appellant Danaher Corporation, Appellant L.L.C. Dental Equipment, Appellant Corporation Dental Imaging Technologies, Appellant Incorporation Instrumentarium Dental AND Appellant Kavo Dental Technologies, L.L.C., Appellant Henry Schein, Incorporated [16-41674] (KMP)

* * * * *

12/21/2017	COURT ORDER denying Motion for stay pending appeal filed by Appellants Danaher Corporation, Instrumentarium Dental, Incorporation, Dental Equipment, L.L.C., KaVo Dental Technologies, L.L.C., Dental Imaging Technologies, Corporation and Henry Schein, Incorporated [8415466-2] Judge(s): PEH, JEG and SAH. [16-41674] (JMA)
12/21/2017	PUBLISHED OPINION FILED. [16-41674 Affirmed] Judge: PEH, Judge: JEG, Judge: SAH. Mandate issue date is 01/12/2018 [16-41674] (This opinion includes URL material that is archived by the Fifth Circuit Court of Appeals Library, and made available at http://www.lb5.uscourts.gov/ArchivedURLS/.) (JMA)
12/21/2017	JUDGMENT ENTERED AND FILED. [16-41674] (JMA)

* * * * *

01/12/2018	MANDATE ISSUED. Mandate issue date satisfied. [16-41674] (CAG)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
(MARSHALL)

No. 2:12-cv-00572-JRG

ARCHER AND WHITE SALES, INC.,
Plaintiff,

v.

HENRY SCHEIN, INC., ET AL.,
Defendants.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
08/31/2012	1	COMPLAINT against All Defendants (Filing fee $ 350 receipt number 0540-3760981.), filed by Archer and White Sales, Inc.. (Attachments: # 1 Civil Cover Sheet) (Beane, Jerry) (Entered: 08/31/2012)
		* * * * *
09/26/2012	10	MOTION to Compel Arbitration and Stay All Proceedings by Danaher Corporation, Dental Equipment LLC, Dental Imaging Technologies, Corporation, Instrumentarium Dental Inc., KaVo

		Dental Technologies, LLC. (Attachments: # 1 Exhibit Declaration of James Weingarten, # 2 Exhibit Ex. A to Declaration, # 3 Exhibit Ex. B to Declaration, # 4 Text of Proposed Order Proposed Order) (Kruse, Layne) (Attachment 4 (Proposed Order) replaced on 9/27/2012) (sm,). Modified on 9/27/2012 (sm,). (Entered: 09/26/2012)
		* * * * *
10/01/2012	14	MOTION to Compel *Plaintiff to Arbitrate and to Stay Proceedings* by Henry Schein, Inc.. (Attachments: # 1 Text of Proposed Order) (Schuster, Paul) (Entered: 10/01/2012)
		* * * * *
10/12/2012	21	RESPONSE in Opposition re 10 MOTION to Compel *Arbitration and Stay All Proceedings [Plaintiff Archer and White Sales, Inc.'s Response in Opposition to Manufacturer Defendants' Motion to Compel Arbitration and Stay All Proceedings] filed by Archer and White Sales, Inc.*. (Attachments: # 1 Affidavit Declaration of Kay Lynn Brumbaugh, # 2 Exhibit 1 to Declaration, #3 Exhibit 2 to Declaration) (Beane, Jerry) (Entered: 10/12/2012)

10/16/2012	22	RESPONSE in Opposition re 14 MOTION to Compel *Plaintiff to Arbitrate and to Stay Proceedings [Plaintiff Archer and White Sales, Inc.'s Response in Opposition to Defendant Henry Schein, Inc.'s Motion to Compel Plaintiff to Arbitrate and to Stay All Proceedings] filed by Archer and White Sales, Inc.* (Beane, Jerry) (Entered: 10/16/2012)
		* * * * *
10/22/2012	24	REPLY to Response to Motion re 10 MOTION to Compel *Arbitration and Stay All Proceedings filed by Danaher Corporation, Dental Equipment LLC, Dental Imaging Technologies, Corporation, Instrumentarium Dental Inc., KaVo Dental Technologies, LLC.* (Attachments: # 1 Exhibit C, # 2 Exhibit D, #3 Exhibit E, # 4 Exhibit F, # 5 Exhibit G) (Kruse, Layne) (Entered: 10/22/2012)
		* * * * *
10/26/2012	31	REPLY to Response to Motion re 14 MOTION to Compel *Plaintiff to Arbitrate and to Stay Proceedings filed by Henry Schein, Inc.*. (Schuster, Paul) (Entered: 10/26/2012)

* * * * *

10/29/2012	33	SUR-REPLY to Reply to Response to Motion re 10 MOTION to Compel *Arbitration and Stay All Proceedings [Plaintiff Archer and White Sales, Inc.'s Sur-Reply in Opposition to Manufacturer Defendants' Motion to Compel Arbitration and Stay All Proceedings] filed by Archer and White Sales, Inc.*. (Beane, Jerry) (Entered: 10/29/2012)

* * * * *

11/05/2012	37	SUR-REPLY to Reply to Response to Motion re 14 MOTION to Compel *Plaintiff to Arbitrate and to Stay Proceedings [Plaintiff Archer and White Sales, Inc.'s Sur-Reply in Opposition to Defendant Henry Schein, Inc.'s Motion to Compel Arbitration and to Stay All Proceedings] filed by Archer and White Sales, Inc.*. (Beane, Jerry) (Entered: 11/05/2012)

* * * * *

02/28/2013	41	Minute Entry for proceedings held before Magistrate Judge Roy S. Payne: Motion Hearing held on 2/28/2013 re Motions to Compel Arbitration 10 and 14 . (Court Reporter Sunbelt Reporting.) (jml) (Entered: 02/28/2013)

* * * * *

05/28/2013	44	ORDER, granting 10 MOTION to Compel *Arbitration and Stay All Proceedings* filed by Dental Equipment LLC, KaVo Dental Technologies, LLC, Instrumentarium Dental Inc., Dental Imaging Technologies, Corporation, Danaher Corporation, granting 14 MOTION to Compel *Plaintiff to Arbitrate and to Stay Proceedings* filed by Henry Schein, Inc. This action is stayed pending arbitration of the claims asserted herein. All parties are directed to notify the Court when the arbitration process is complete or if it has been abandoned. Signed by Magistrate Judge Roy S. Payne on 5/28/13. (mrm,) *****VACATED per 63 Memorandum Opinion and Order on 12/7/2016*****(jml). (Entered: 05/28/2013)
06/10/2013	45	MOTION for Reconsideration re 44 Order Staying Case[Plaintiff's Motion for Reconsideration of Magistrate Judge's May 28, 2013 Memorandum Order] by Archer and White Sales, Inc.. (Attachments: # 1 Text of Proposed Order) (Beane, Jerry) (Entered: 06/10/2013)
06/20/2013	46	RESPONSE in Opposition re 45 MOTION for Reconsideration re

		44 Order Staying Case. Plaintiff's Motion for Reconsideration of Magistrate Judge's May 28, 2013 Memorandum Order] MOTION for Reconsideration re 44 Order Staying Case, *[Plaintiff's Motion for Reconsideration of Magistrate Judge's May 28, 2013 Memorandum Order] Manufacturer Defendants' Memorandum in Opposition to Plaintiff's Motion for Reconsideration of Magistrate Judge's May 28, 2013 Memorandum Order (Dkt. #44) filed by Danaher Corporation, Dental Equipment LLC, Dental Imaging Technologies, Corporation, Instrumentarium Dental Inc., KaVo Dental Technologies, LLC.* (Attachments: # 1 Exhibit Exhibits to Manufacturer Defendants' Memorandum in Opposition to Plaintiff's Motion for Reconsideration of Magistrate Judge's May 28, 2013 Memorandum Order (Dkt. #44)) (Pitt, Jonathan) (Entered: 06/20/2013)
06/20/2013	47	RESPONSE in Opposition re 45 MOTION for Reconsideration re 44 Order Staying Case, Terminate Motions, , , , *[Plaintiff's Motion for Reconsideration of Magistrate Judge's May 28, 2013 Memorandum Order]* MOTION for Reconsideration re 44 Order

Staying Case, Terminate Motions, , , , *[Plaintiff's Motion for Reconsideration of Magistrate Judge's May 28, 2013 Memorandum Order] filed by Henry Schein, Inc.*. (Attachments: # 1 Schuster Declaration, # 2 Exhibit A, # 3 Text of Proposed Order) (Schuster, Paul) (Entered: 06/20/2013)

06/27/2013	48	REPLY to Response to Motion re 45 MOTION for Reconsideration re 44 Order Staying Case, Terminate Motions, , , , *[Plaintiff's Motion for Reconsideration of Magistrate Judge's May 28, 2013 Memorandum Order]* MOTION for Reconsideration re 44 Order Staying Case, Terminate Motions, , , , *[Plaintiff's Motion for Reconsideration of Magistrate Judge's May 28, 2013 Memorandum Order] [Plaintiff's Reply in Support of Motion for Reconsideration of Magistrate Judge's May 28, 2013 Memorandum Order (DKT #44)] filed by Archer and White Sales, Inc.*. (Beane, Jerry) (Entered: 06/27/2013)

* * * * *

07/03/2013	51	SUR-REPLY to Reply to Response to Motion re 45 MOTION for Reconsideration re 44 Order Staying Case, filed by Danaher

		Corporation, Dental Equipment LLC, Dental Imaging Technologies, Corporation, Instrumentarium Dental Inc., KaVo Dental Technologies, LLC. (Pitt, Jonathan) (Entered: 07/03/2013)
07/03/2013	52	SUR-REPLY to Reply to Response to Motion re 45 MOTION for Reconsideration re 44 Order Staying Case, filed by Henry Schein, Inc.. (Schuster, Paul) (Entered: 07/03/2013)
		* * * * *
11/09/2016	61	ORDER VACATING REFERRAL OF PRETRIAL MATTERS. Signed by Judge Rodney Gilstrap on 11/8/2016. (nkl,) (Entered: 11/09/2016)
11/09/2016	62	Minute Entry for proceedings held before Judge Rodney Gilstrap: Status Conference held on 11/9/2016. (Court Reporter Shelly Holmes, CSR-TCRR.) (Attachments: # 1 Attorney Attendance Sheet) (jml) (Entered: 11/09/2016)
12/07/2016	63	MEMORANDUM AND OPINION-- It is therefore ORDERED that the Magistrate Judge's Order (Dkt. No. 44) is hereby VACATED. Accordingly, the Motions to Compel Arbitration filed by Defendant Schein and the Manufacturer Defendants are

		DENIED, and the stay previously entered in this case is hereby LIFTED.The trial date for this action is hereby set for February 5, 2018, and the pretrial hearing date is set for January 8, 2018. Accordingly, the Parties are ORDERED to meet and confer and thereafter jointly submit a proposed Docket Control Order to the Court within 14 days of this Order based on the above trial and pre-trial dates. Signed by Judge Rodney Gilstrap on December 7, 2016. (jml) (Entered: 12/07/2016)
		* * * * *
12/13/2016	64	NOTICE OF APPEAL as to 63 Memorandum & Opinion,, by Danaher Corporation, Dental Equipment LLC, Dental Imaging Technologies, Corporation, Instrumentarium Dental Inc., KaVo Dental Technologies, LLC. Filing fee $ 505, receipt number 0540-6069680. (Attachments: # 1 Exhibit Memorandum Opinion and Order) (Weingarten, James) (Entered: 12/13/2016)
12/14/2016	65	NOTICE OF APPEAL by Henry Schein, Inc.. Filing fee $ 505, receipt number 0540-6070414.

		(Schuster, Paul) (Entered: 12/14/2016)
12/14/2016	66	Joint MOTION to Stay *Proceedings Pending Appeal* by Danaher Corporation, Dental Equipment LLC, Dental Imaging Technologies, Corporation, Henry Schein, Inc., Instrumentarium Dental Inc., KaVo Dental Technologies, LLC. (Attachments: # 1 Text of Proposed Order Proposed Order) (Weingarten, James) (Entered: 12/14/2016)
		* * * * *
12/21/2016	70	RESPONSE in Opposition re 66 Joint MOTION to Stay *Proceedings Pending Appeal Plaintiff's Response in Opposition to Defendants' Motion to Stay Proceedings Pending Appeal filed by Archer and White Sales, Inc.*. (Attachments: # 1 Text of Proposed Order Proposed Order) (Brumbaugh, Kay Lynn) (Entered: 12/21/2016)
		* * * * *
02/17/2017	88	MEMORANDUM OPINION AND ORDER re 66 Joint MOTION to Stay *Proceedings Pending Appeal* filed by Dental Equipment LLC, Henry Schein, Inc., KaVo Dental Technologies, LLC, Instrumentarium Dental Inc.,

		Dental Imaging Technologies, Corporation, Danaher Corporation. Signed by Judge Rodney Gilstrap on 2/17/2017. (nkl,) (Entered: 02/17/2017)
		* * * * *
10/30/2017	261	Sealed Document. SECOND AMENDED COMPLAINT (Baxter, Samuel) (Entered: 10/30/2017)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

Civil Action No. _____

ARCHER AND WHITE SALES, INC.,
Plaintiff,

v.

HENRY SCHEIN, INC., DANAHER CORPORATION, INSTRUMENT ARIUM DENTAL INC., DENTAL EQUIPMENT LLC, KAVO DENTAL TECHNOLOGIES, LLC AND DENTAL IMAGING TECHNOLOGIES, CORPORATION,
Defendants.

COMPLAINT

Plaintiff Archer and White Sales, Inc. ("Archer Dental") files this action against Defendants Henry Schein, Inc. ("Schein"), Danaher Corporation ("Danaher"), Instrumentarium Dental Inc. ("Instrumentarium"), Dental Equipment LLC d/b/a Pelton & Crane ("Pelton & Crane"), Dental Equipment LLC d/b/a Marus ("Marus"), Dental Equipment LLC d/b/a DCI Equipment ("DCIE"), KaVo Dental Technologies, LLC ("KaVo") and Dental Imaging Technologies, Corporation d/b/a Gendex Corp. ("Gendex"), (collectively, "Defendants"). Archer Dental seeks treble damages and injunctive relief for violations by all Defendants of Section 1 of the Sherman Act, 15

U.S.C. § 1, and the Texas Free Enterprise and Antitrust ACT, TEX. BUS. & COMM. CODE, § 15.01.

NATURE OF THE CASE

1. This is an antitrust case arising out of the combination and conspiracy by Schein and Company X (not named as a defendant in this complaint), who are horizontal competitors in the distribution of dental equipment, to fix prices and refuse to compete with each other on the sales of dental equipment to dental professionals and their further agreement with each other to force their common supplier Danaher and its various subsidiaries (collectively, "Danaher") to terminate and/or reduce the distribution territory of their price-cutting competing distributor Archer Dental. This termination was an illegal boycott, the purpose of which was to allow Schein and Company X to maintain and perpetuate their price-fixing agreement and their agreement not to compete on the sales of dental equipment. Danaher, as a common supplier of dental equipment to Schein, Company X and Archer Dental, facilitated the reduction in competition to increase prices by knowingly participating in the illegal boycott. Danaher knowingly participated in the illegal boycott to insure that Schein, a large and dominant distributor of Danaher dental equipment, and Company X, a significant distributor of Danaher dental equipment, would continue to sell and promote Danaher dental equipment. Danaher prohibited Archer Dental from selling dental equipment in areas and to customers which the distribution agreements between Archer Dental and Danaher or its predecessors permitted Archer Dental to sell, and it denied Archer Dental the discount structure to which Archer Dental was entitled based on its sales. Although the full extent of Archer Dental's damages caused by Defendants

are not fully known at this time, they are estimated to be in the tens of millions of dollars.

2. Defendants and Company X have carried out their conspiracy through a series of unlawful activities, including, but not limited to agreements not to compete, agreements to fix prices, and boycotts. Defendants' and Company X's conspiracy is continuing and they have committed acts in furtherance of that conspiracy in the four years preceding the filing of this complaint.

3. Defendants' and Company X's conspiracy enables them to enjoy the economic benefits that flow from conspiring to operate an unlawful cartel that refuses to compete for the sale of dental equipment, forecloses competition by others in the sale of dental equipment and fixes prices for dental equipment purchased by dental professionals throughout the United States.

JURISDICTION, VENUE AND INTERSTATE COMMERCE

4. This action is brought under Section 1 of the Sherman Act, 15 U.S.C. § 1 and the Texas Free Enterprise and Antitrust Act, TEX. BUS. & COMM. CODE, § 15.05.

5. This Court has subject matter jurisdiction over Plaintiff's claims pursuant to 28 U.S.C. §§ 1331 and 1337, and 15 U.S.C. §§ 15 and 26.

6. This Court has personal jurisdiction over Defendants because each of them systematically and continuously transacts substantial business in the United States and in Texas and in the Eastern District of Texas.

7. Venue is proper in this District pursuant to 15 U.S.C. § 22 and 28 U.S.C. § 1391 because Defendants inhabit, transact business, reside, are found to have an agent in this District and a substantial part of the events

or omissions giving rise to the claim occurred in this District.

8. Defendants Danaher, KaVo, Instrumentarium, Gendex, Pelton & Crane, Marus and DCIE sell dental equipment across state lines. Defendant Schein markets and sells dental equipment across state lines. All Defendants receive substantial payments across state lines from the sale of dental equipment. Defendants' business activities that are the subject of this Complaint are within the flow of, and substantially have affected, interstate trade and commerce.

PARTIES

Plaintiff

9. Plaintiff Archer Dental is located at 1107 Summit Avenue, Suite 1, in Plano, Collin County, Texas, in the Eastern District of Texas. Archer DePntal is a family-owned business and has been in the business of distribution, sales and service of dental equipment and supplies to dental professionals since 1983.

Defendants

10. Defendant Danaher is a for-profit corporation organized and existing under the laws of the State of Delaware with its principal place of business at 2200 Pennsylvania Avenue, NW, Suite 800W, Washington, DC 20037. Defendant Danaher may be served with process by serving its Registered Agent, Corporation Service Company, 2711 Centerville Rd., Suite 400, Wilmington, DE 19808. On information and belief, Danaher is the largest manufacturer of dental equipment in the United States. Danaher primarily sells and distributes its dental equipment through distributors such as Schein, Company X and Archer Dental.

11. Defendant Instrumentarium is a for-profit corporation organized and existing under the laws of the State of Wisconsin with its principal place of business at 1245 W. Canal St., Milwaukee, Wisconsin 53233. Defendant Instrumentarium may be served with process by serving its Registered Agent, CT Corporation System. 8040 Excelsior Drive, Suite 200, Madison, WI 53717. On information and belief, Instrumentarium is a wholly-owned subsidiary of Danaher. Instrumentarium primarily sells and distributes its dental equipment through distributors such as Schein, Company X and Archer Dental.

12. Defendant Dental Equipment LLC does business under the names Pelton & Crane Marus and DCI Equipment. Dental Equipment LLC is a for-profit corporation organized and existing under the laws of the State of North Carolina with its principal place of business at 11727 Fruehauf Drive, Charlotte, North Carolina 28273. Defendant Dental Equipment LLC may be served with process by serving its Registered Agent, CT Corporation System, 150 Fayetteville St., Box 1011, Raleigh, NC 27601. On information and belief, Dental Equipment LLC is a wholly-owned subsidiary of Danaher. Dental Equipment LLC primarily sells and distributes its dental equipment through distributors such as Schein, Company X and Archer Dental.

13. Defendant KaVo is a for-profit corporation organized and existing under the laws of the State of North Carolina with its principal place of business at 1340 East Main Street, Lake Zurich, Illinois 60047. Defendant KaVo may be served with process by serving its Registered Agent, Secretary of State, 2 South Salisbury Street, Raleigh, NC 27601. On information and belief, KaVo is a wholly-owned subsidiary of Danaher. KaVo primarily

sells and distributes its dental equipment through distributors such as Schein, Company X and Archer Dental.

14. Defendant Gendex is a for-profit corporation organized and existing under the laws of the State of Pennsylvania with its principal place of business at 1910 N. Penn Road, Hatfield, Pennsylvania 19440. Defendant Gendex may be served with process by serving its Registered Agent, The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, DE 19801. On information and belief, Gendex is a wholly-owned subsidiary of Danaher. Gendex primarily sells and distributes its dental equipment through distributors such as Schein, Company X and Archer Dental.

15. Defendant Schein is a for-profit corporation organized and existing under the laws of the State of Delaware with its principal place of business at 135 Duryea Road, Melville, New York 11747. Defendant Schein may be served with process by serving its Registered Agent, Department of State, New York City Location, 123 William Street, New York, NY 10038-3804. On information and belief, Schein is the largest distributor of dental equipment in the United States. Schein's overall net sales in 2011 were a record $8.5 billion. Schein's dental sales constitute over one-third of its total net sales.

16. Company X is not sued in the complaint. It is a real company and is a significantparticipant in the business of sales and service of dental equipment and supplies in the United States. Neither its real name nor the real name of its manager is used in this complaint. Defendants are aware of the participants to the communications and conduct described in this complaint.

17. Schein and Company X distribute many of the same lines of dental equipment in the same geographic areas and are therefore horizontal "competitors," but as described below,they have secretly agreed not to compete.

18. The acts charged in this Complaint as having been done by Defendants and Company X were authorized, ordered, and/or done by their officers, agents, employees, and/or representatives, while actively engaged in the management of their business and affairs.

BACKGROUND

19. In 1963, James Archer, Sr. began working in the dental equipment sales and service industry as the college representative at Baylor Dental School in Dallas, Texas. After college, he worked for several companies in the dental business over the years.

20. In 1983, James Archer, Sr. started a dental equipment sales and service business which became Archer and White Sales, Inc. in Plano, Collin County, Texas. Archer Dental's primary customers are dentists. Mr. Archer was a pioneer of the discount full service dental equipment supplier business. Mr. Archer's son, James Jr., started working in the family business when he was only 12 years old by repairing dental hand pieces. James Archer, Jr. took the company into national sales distribution of dental equipment in 1993 through catalog and later internet sales. James Archer, Jr. is now the President of Archer Dental.

21. Prior to 2004, there were a number of dental equipment manufacturers in the U.S., and Archer Dental was an authorized distributor for multiple manufacturers, including Gendex, Kavo, Pelton & Crane, Marus, Kerr, DCI and others. Beginning in or around 2004, Danaher embarked on a plan to consolidate the dental equipment

manufacturing industry. Danaher has become the largest manufacturer of dental equipment, in part, by acquiring multiple smaller manufacturers of dental equipment over the years. For example, in 2004, Danaher acquired the Kavo and Gendex dental equipment businesses. In 2005, Danaher acquired the Pelton & Crane, Marus and DCI dental equipment businesses. In 2009, Danaher acquired PaloDEx Group, the owner of the Instrumentarium line of equipment. On information and belief, Danaher controls and directs the business activities of the dental equipment companies it has acquired and that are identified herein. Given that it owns and now controls a substantial portion of the dental equipment manufacturing industry, doing business with Danaher is essential to the economic success of dental equipment distributors such as Archer Dental. Certain Danaher brands have unique features and capabilities and are accepted by dentists in ways that other brands are not. The ability to distribute Danaher dental equipment brands is necessary for Archer Dental to compete effectively in the industry with Schein and Company X.

22. Archer Dental became known nationally among dental professionals (who purchase and use dental equipment) for its low prices and high-quality service. Archer Dental's sales always grew significantly when it gained distribution rights to an equipment line or a new distribution territory. That growth, however, would eventually draw the attention and later the action of its competitors who disliked Archer Dental's lower prices. As Archer Dental would learn later, it also became nationally known and disliked by competing dealers because of its low prices. What Archer Dental would not know for some time was the illegal lengths to which its competitors would go to shut down Archer Dental so that those competitors could maintainartificially high prices.

The Conspiracy to Thwart Archer Dental's Growth in Oklahoma and Northwest Arkansas

23. Archer Dental's authorized distribution territory in its dealer agreements with Danaher allowed it to sell equipment in Texas and parts of Oklahoma and Northwest Arkansas. In addition to its strong Texas sales, Archer Dental's sales of equipment into Oklahoma and Northwest Arkansas were strong. In 2004, Archer Dental explored the possibility of partnering with a company that already had a physical location in Oklahoma to further expand its sales in Oklahoma and Northwest Arkansas. When Company X's Dental manager in Oklahoma, (identified as XGM for purposes of this complaint), learned of Archer Dental's possible expansion plans, he called James Archer, Sr. and begged him not to enter into Oklahoma in a bigger way. Little did Archer Dental know at the time, but XGM's phone call was far more than just one old friend making a plea to another; XGM's call was part of a broader conspiracy to stifle competition in the dental equipment business.

24. In July 2004, Archer Dental entered into a business arrangement with Oklahomabased dental distributor Dynamic Dental Solutions, Inc. ("Dynamic") whereby Dynamic would act as a sales representative for Archer Dental for various equipment lines which Archer Dental was authorized to sell. Archer Dental was billed by Danaher for the equipment Dynamic sold on Archer Dental's behalf, and Archer Dental paid Danaher for that equipment. Archer Dental had financial responsibility for the equipment that Dynamic sold on Archer Dental's behalf. Dynamic received a percentage of the sales that it made on behalf of Archer Dental. Importantly, Archer Dental it-

self continued to make sales in significant volumes directly into Oklahoma and Northwest Arkansas after Dynamic became its sales representative.

25. At the time Archer Dental entered into its arrangement with Dynamic, Archer was an authorized dealer of several dental equipment manufacturers including Pelton & Crane, Marus, DCI, DentalEZ and others. Marus and others recognized Dynamic as an authorized branch location of Archer Dental.

26. As Archer Dental's sales agent, Dynamic practiced the same high-quality-service, low-price philosophy practiced by Archer Dental. As a result, Dynamic's sales grew significantly in its first few years after its business arrangement with Archer Dental. While Dynamic's sales were growing, Schein and Company X were engaged in a price-fixing conspiracy and an agreement not to competitively bid against each other. Once Dynamic's annual sales of equipment for lines such as Pelton & Crane reached almost a million dollars, Schein and Company X began to take notice and they were not happy as those sales were cutting into their anticompetitive, fixed margins. Initially, Schein and Company X merely complained to the equipment manufacturers, such as Danaher, about Dynamic's competitive pricing. As Dynamic's sales continued to grow, however, Schein and Company X escalated their attack on Archer Dental.

27. In September 2007, Dynamic applied to membership in the American Dental Cooperative, Inc. ("ADC") (now known as "NDC Dental"), a cooperative organization created to assist smaller, independent companies compete against large national companies. ADC membership is vital to the ability of smaller, independent dealers to obtain access to various lines of dental product and

equipment lines that these dealers could not otherwise obtain. Dynamic's membership application to ADC was accepted and the membership acceptance confirmed in December 2007 by a verbal confirmation from ADC to Dynamic and by ADC's providing to Dynamic a complete set of confidential, exclusive ADC price sheet for items that ADC makes available to its members.

28. In early 2008, however, before Dynamic could realize the benefits of its membership, ADC revoked Dynamic's membership on the basis of unspecified "input received." What Archer Dental discovered much later was that Dynamic's membership had been revoked because Company X's manager XGM complained to ADC about Dynamic's low prices and insisted that ADC terminate Dynamic's membership.

29. The secret campaign to oust Dynamic from ADC membership was not the only anticompetitive activity being waged against Archer Dental and its sales agent Dynamic in January 2008. Archer Dental would later learn that in January 2008, Schein's Tulsa Manager Mark Lowery threatened Danaher's Pelton & Crane representative Don Givens. Lowery told Givens that Schein – Pelton & Crane's largest distributor – would stop selling Pelton & Crane equipment if Pelton & Crane did not stop doing business with Dynamic and Archer Dental.

30. Consistent with the coordinated and conspiratorial scheme between Company X and Schein, in January 2008, Company X's manager XGM made the same threat to Don Givens and also to other dental equipment manufacturers such as Belmont Equipment. The threats from Schein and Company X were clear – either stop selling equipment to Archer Dental and Dynamic because they are interfering with Schein's and Company X's ability to continue to ob-

tain anticompetitive, fixed prices from dental professionals to whom they were selling, or Schein and Company X will stop buying equipment from Danaher and Belmont.

31. By the time Schein and Company X began their coordinated boycotting activities against Archer Dental and Dynamic, Danaher had acquired multiple lines of dental equipment that had previously been manufactured by independent companies, including Pelton & Crane, Marus and DCI. Danaher possessed, and continues to possess, a dominant position in the dental equipment market. Danaher obviously took the threats from Schein and Company X seriously. Danaher agreed to join their illegal boycott and deprive Archer Dental of the ability to distribute dental equipment it needed to compete effectively.

32. In response to the threats from Schein and Company X, in January 2008, Danaher Regional Sales Manager, Dan Bump met with Lowery of Schein and XGM of Company X to discuss Archer Dental's and Dynamic's prices and what to do about them. Bump also met with Schein's Little Rock, Arkansas branch as well. At the meetings, Danaher, Schein and Company X collectively agreed that Dynamic and Archer Dental would be cut off from selling Pelton & Crane, Marus and DCI dental equipment in Oklahoma and Northwest Arkansas. Not only was Dynamic cut off from selling the various Danaher equipment lines in Oklahoma and Northwest Arkansas, but Archer Dental, which had separately been selling into those states for years, was completely banned by Danaher from selling into Oklahoma and Northwest Arkansas as well and was restricted to selling in Texas only. With Dynamic and Archer Dental removed as competitors, Schein and C mpany X could continue their agreement to fix margins on dental equipment sold to dental

professionals. As the quid pro quo for terminating Dynamic and cutting back Archer Dental's direct sales to Texas, Schein and Company X promised Danaher to (1) continue to distribute Danaher dental equipment brands, and (2) "make up" the sales volume that Danaher would lose as the result of restricting Archer Dental's and Dynamic's ability to sell Pelton & Crane, Marus and DCI equipment. In fact, in order to sufficiently make up the volume lost by restricting Archer Dental (because, on information and belief, Archer Dental had become the 5th largest Pelton & Crane dealer in the U.S.), Danaher secured promises for additional sales not only from Schein's Oklahoma branch managed by Lowery but also Schein's Little Rock, Arkansas branch, in addition to the promise from XGM on behalf of Company X, because it would take all three of them to make up the significant sales previously made by Archer Dental and Dynamic. Pelton & Crane did not inform Archer Dental or Dynamic of the termination and restriction decisions at the time they were agreed to by Schein, Company X and Danaher.

33. The decision to restrict and terminate Archer Dental and Dynamic was a collective decision between and among horizontal competitors Schein and Company X and their common manufacturer Danaher. The way in which the decision was communicated underscores that the decision was the product of collusion. On February 25, 2008, Schein held a teleconference with its employees and announced to them that Dynamic had been terminated from selling the Pelton & Crane line of equipment and that Archer Dental had been cut back. Over a week later, Dynamic finally received written notification that it would not longer be able to distribute Pelton & Crane, Marus or DCI products, and Danaher Regional Sales Manager Dan Bump told Archer Dental that it could not sell past the Red River and was restricted to selling dental equipment

within the State of Texas. Danaher restricted Archer Dental to Texas as part of the illegal boycott and despite Archer Dental's years of strong sales within the States of Oklahoma and Arkansas.

34. During the Oklahoma Dental Association meeting on May 17, 2008, Skip Pettus of Dynamic was walking down an aisle at the meeting and ran into XGM of Company X and Ron Fernandez of Schein who were involved in a conversation. XGM told Pettus that the three of them should sit down and talk. Then XGM said to Pettus, "You have got to raise your prices!" Then Mark Lowery of Schein walked up and joined the conversation. Lowery and XGM proceeded to explain Schein's and Company X's ongoing price-fixing agreement to Pettus and invited him to join it on behalf of Dynamic and Archer Dental.

35. Disturbed by the content of the May 17, 2008 meeting, Archer Dental set out to determine what had really been happening in the dental equipment industry. What it would learn and be told by participants in the cartel would disturb Archer Dental even more.

36. On May 27, 2008, at the request of Archer Dental, Skip Pettus met with Company X manager XGM to investigate Archer Dental's concerns that anticompetitive conduct – conduct directed at Archer Dental and all purchasers of dental equipment – was occurring and that the ringleaders were Schein and Company X.

37. During the meeting with XGM, he described the "trust" relationship between Schein and Company X – an unusual adjective to describe the relationship between two companies that publicly present themselves to their customers as competitors. XGM explained that Company X will not compete with Schein in situations in which Company X knows that Schein has already begun talking with

a dental professional to sell dental equipment. XGM will simply tell the dental professional that they should buy their equipment from Schein. As XGM described it, his counterpart at Schein "knows that I'm not going to go behind his back and try to get that customer." When a dental professional asks Company X to provide a price on an item that Schein has already offered to sell that customer, Company X simply tells the dental professional, "I want you to buy [the items] from Ron [a Schein salesman]."

38. XGM, like his counterpart at Schein, explained to Pettus that he wanted to be "on the same playing field" with his competitors. In an effort to facilitate bringing Archer Dental into their unlawful agreements, XGM even offered to contact his counterparts at Schein to encourage a meeting with Pettus.

39. On June 2, 2008, Pettus met with Schein manager Mark Lowery. That meeting was even more revealing about the ongoing anticompetitive agreements between Schein and Company X. Echoing almost the identical words of XGM, Lowery remarked to Pettus: "I think when everyone plays on the same playing field, it makes things a whole lot easier." Lowery explained that he "like[s] [XGM]" and considers [XGM] a "good competitor."

40. Lowery explained in great detail how Schein and Company X enforce their unlawful agreements and stay on that same "playing field." Lowery explained that if Schein is talking to a customer and that customer calls Company X to check a price, Company X manager XGM "step[s] out of it . . . [he's] not going to bid it" because Company X "wants to maintain a certain [gross profit]." Similarly, if Schein receives a request for price from a customer, in the interest of "keeping the integrity of margins," (*i.e.*, the conspirators' code phrase for keeping

prices artificially high), Schein is "not going to talk about price" because Schein does not want to be "slugging it out [with competition] and killing each other on margins." Under the Schein-Company X agreement, as Lowery put it, "[T]he doctor gets it for the same price no matter who they buy it from."

41. Schein and Company X enforce their unlawful agreement by staying in close contact. When there are "issues [as in someone charging too low a margin]," Lowery and XGM call each other and ask "what's going on?" Lowery confessed, "I have no problem calling [XGM] up and going what the hell are you doing, [XGM]? Are you trying to screw me over here?" As an example, Lowery admitted that he called XGM about a dentist in Tahlequah, Oklahoma because the dentist had previously bought from Schein, and Company X's sale of an item to this dentist violated the illegal non-competition agreement between the two companies.

42. Lowery also explained to Pettus how Schein and Company X have brought manufacturers, including Danaher, into the fold by utilizing the manufacturer representatives to enforce the margin-fixing agreement in two ways: (1) agreeing with the manufacturers that they give all dealers the same deal so that all the dealers are "on the same playing field" and (2) terminating or restricting competing dealers who refuse to play on the same field and sell at the same high prices at which Schein and Company X agree with each other to sell.

43. In their meeting, Lowery made it clear to Pettus that the only way that Schein would leave Archer Dental's Oklahoma branch alone and cease the boycotting agreement was for Archer Dental's Oklahoma branch to "play on the same field." In other words, so long as Dynamic maintained margins high, Lowery "[doesn't] care." He

just wanted his competitors to "have the same goal in mind." Lowery bragged that he "knows [XGM]. You guys [Dynamic] are the unknown." He expressed concern that Dynamic will "give away margin" whereas Company X will not. He even went so far as to gloat that he thinks it is "terrific" when Company X gets "full boat [*i.e.*, profit margin that is in excess of 32%]" on a sale; he's "happy" with that.

44. Acknowledging the need to keep the price-fixing agreement secret, Lowery instructed Pettus to "make it invisible with the customer because we don't want to compromise that end of it and make it look like we are . . . having a big conspiracy going on . . ." Lowery observed that if Dynamic offered a price based on its usual margin percentage and Schein offered a price based on its usual margin percentage (a percentage significantly higher than Dynamic's), it just made the higher priced company "look like you're really trying to gouge the doctor." That does not happen, however, when competitors are adhering to the unlawful agreement. Because of the anticompetitive agreements with competitors, Lowery boasted that he can give a customer a price "with confidence" and tell them to "go ahead" and do a price check because he secretly knows that the customer will not be offered a lower price by a competitor.

45. Lowery complained to Pettus that had Dynamic not made Schein "look stupid" by offering lower prices and had Dynamic been "upon the level playing field" [charging the same high prices as Schein] then everything would have been "hunky dory." Schein and Company X would not have complained to Pelton & Crane, would not have entered into an agreement to cut off Dynamic, and Dynamic would still have the Pelton & Crane line today.

Schein, Company X, and Danaher Agree to Restrict Archer Dental's Instrumentarium Distribution

46. During the time that the sales of Archer Dental's Oklahoma branch were growing exponentially, it was agreed in September 2007 during the American Dental Association meeting with Instrumentarium management, John Franz and Mike Null, that Archer Dental would be the first hybrid, national dealer of Instrumentarium dental imaging equipment. A hybrid dealer is one that sells nationally from a single location with no geographic restrictions, in contrast to the limited geographic territories that may be placed on other dealers. The announcement of Archer Dental's new status as the first national hybrid dealer was made by Instrumentarium management to all Instrumentarium sales representatives equipment at the Instrumentarium national sales meeting in 2007. The appointment of Archer Dental as Instrumentarium's first national hybrid dealer was a significant achievement for Archer Dental. As an independent, family-owned business in Plano, Texas, it had established the type of reputation that enabled it to be permitted to sell the cutting-edge, high-end dental imaging equipment made by Instrumentarium, throughout the U.S. – a distinction no other small, independent dealer had been given.

47. Archer Dental quickly demonstrated why it had received the national hybrid dealer appointment. Archer Dental experienced significant sales increases of Instrumentarium equipment. In fact, Archer Dental experienced 90% sales growth each year in the two years it was a national Instrumentarium distributor.

48. With the sales growth of Instrumentarium equipment by Archer Dental, it became obvious to Schein and Company X that they were continuing to lose business to

Archer Dental. Due to its competitive pricing of Instrumentarium equipment, Schein's and Company X's pricefixing agreement was threatened. Schein and Company X therefore decided to widen their anticompetitive campaign against Archer Dental to restrict further its distribution territory and decrease competition.

49. They initially began complaining to Instrumentarium about Archer Dental's pricing. But as with their tactics in Oklahoma, Schein and Company X escalated the threats, telling Instrumentarium that they would not sell Instrumentarium products unless Instrumentarium boycotted Archer Dental.

50. Once again, Danaher, through its predecessor Instrumentarium, decided to join the conspiracy rather than exercise independent business judgment. Instrumentarium gave Company X and Schein veto power over Archer Dental's sales. For example, in October 2008, Archer Dental was directed to "back off" by the Director of Sales for Instrumentarium from a sale to a dentist in the State of Washington because Company X had been working with this dentist and Instrumentarium could not allow the dentist to insist on getting a "lower price out of a local dealer." In other words, Instrumentarium prohibited Archer Dental from making a sale of Instrumentarium equipment in order to force the dentist to pay Company X's higher price for dental equipment. In March of 2009, at Schein's behest this time, Archer Dental was again prohibited by Instrumentarium from making a sale to a dentist in California. These were not isolated incidents. As the Director of Sales of Instrumentarium, Mike Null, explained to Archer Dental, "This is Schein's backyard and Schein is raising hell about your current pricing. . . ." The anticompetitive conduct directed at Archer Dental was undertaken with full

awareness and approval at Schein headquarters. Null admitted to Archer Dental, "You can't believe what an issue you've become at Schein corporate."

51. Ultimately, Schein and Company X informed Instrumentarium representatives that they could not even set foot in Schein and Company X showrooms and Schein and Company X threatened that they would not sell Instrumentarium equipment until Instrumentarium terminated Archer Dental's ability to distribute Instrumentarium equipment on a national basis. And that is precisely what Instrumentarium, in consort with Schein and Company X did, by letter dated April 2, 2009. Using language suspiciously similar to Schein manager Lowery's references to "margin integrity," Instrumentarium stated that it was reducing Archer Dental's distribution territory from national distribution to the State of Texas in part because of "the integrity of its end-user pricing." In one fell swoop, Archer Dental went from selling over $1.2 million of Instrumentarium equipment in 2009 to $100,000 in 2011. And dentists outside of Texas lost their competitive alternative and instead have been forced to pay prices fixed by agreement between Schein and Company X, all with the knowledge and complicity of Danaher.

52. On information and belief, Defendants' and Company X's conspiracy is continuing and injury to Archer Dental from that conspiracy is continuing. Indeed, as recently as May 2012, Danaher management has threatened Archer Dental that if it "steals" (*i.e.*, competes with and/or offers a better price to a dentist than Schein or other horizontal competitors), Archer Dental will be terminated from selling Danaher equipment.

CONCEALMENT AND TOLLING

53. Throughout the relevant period, Defendants and Company X have affirmatively concealed from Plaintiff the unlawful combination, conspiracy and agreement among them alleged in this Complaint. Defendants and Company X have conducted their conspiracy in secret. Upon information and belief, Defendants and Company X planned and implemented the conspiracy during non-public meetings, monitored and enforced the conspiracy in non-public meetings, agreed not to discuss or disclose the details of their conspiracy, falsely represented to Plaintiff that the reasons for the actions taken by Danaher with respect to Plaintiff's distribution rights were unilateral and based on legitimate business reasons, and falsely represented to customers that the prices they paid for dental equipment were fair and competitive.

54. As a result of Defendants' and Company X's concealment, any applicable statute of limitations affecting the rights of Plaintiff has been tolled. Plaintiffs exercised due diligence to learn of their legal rights, and, despite the exercise of due diligence, did not discover and could not have discovered the unlawful conduct alleged herein at the time it occurred. Any applicable statute of limitations has also been tolled by agreement.

COUNT ONE
SHERMAN ACT SECTION 1
VIOLATION AGAINST ALL DEFENDANTS

55. Plaintiff incorporates by reference paragraphs 1 through 54 as if fully alleged herein.

56. At all times relevant to the Complaint, Defendants and Company X have combined and conspired to eliminate competition for the sale of dental equipment and to

maintain margins on the sale of such equipment at anti-competitive levels. In furtherance of their conspiracy, Defendants and Company X have agreed not to compete, agreed not to provide price quotes to dentists who request them and agreed to fix margins on equipment prices. In furtherance of their conspiracies and illegal agreements, Schein and Company X agreed with Danaher (and its predecessor companies) to boycott, terminate and/or restrict Archer Dental's distribution territories.

57. These agreements are *per se* violations of Section 1 of the Sherman Act. More specifically, elimination, by joint collaborative action, of discounters from access to the market is a *per se* violation of the Sherman Act. The participation in the agreement by Danaher, the common supplier to Defendants, Company X and Plaintiff, does not change the character of the conspiracy. Indeed, a conspiracy is horizontal in nature when a number of competitor firms agree with each other and at least one of their common suppliers or manufacturers to eliminate their price-cutting competition by cutting his access to supplies.

58. The agreements that Defendants and Company X have entered, maintained, renewed and enforced with one another have had the purpose and effect of eliminating competition for the sale of dental equipment by and among dealers of dental equipment and maintaining prices for such equipment above competitive levels. Furthermore, as the result of Defendants' and Company X's conduct, all dentists have been deprived of the competition offered by Archer Dental and have overpaid for dental equipment.

59. As a direct and proximate result of Defendants' and Company X's past and continuing violations of Section 1 of the Sherman Act, Plaintiff has suffered injury and damages in an amount to be proved at trial.

60. Plaintiff seeks money damages from Defendants jointly and severally for these violations. These actual damages should be trebled under Section 4 of the Clayton Act, 15 U.S.C. § 15.

61. Plaintiff also seeks injunctive relief. The violations set forth above are continuing and will continue unless injunctive relief is granted.

COUNT TWO
VIOLATION OF TFEAA AGAINST ALL DEFENDANTS

62. Plaintiff incorporates by reference paragraphs 1 through 54 as if fully alleged herein.

63. At all times relevant to the Complaint, Defendants and Company X have combined and conspired to eliminate competition for the sale of dental equipment and to maintain margins on the sale of such equipment at anti-competitive levels. In furtherance of their conspiracy, Defendants and Company X have agreed not to compete, agreed not to provide price quotes to dentists who request them and agreed to fix margins on equipment prices. Defendants and Company X have enforced this agreement in part by agreeing with Danaher (and its predecessor companies) to boycott, terminate and/or restrict Archer Dental's distribution territories. The result of that illegal *per se* boycott has been to eliminate or restrict Archer Dental's ability to distribute and sell Danaher lines of dental equipment to dental professionals in Texas. For example, as explained above, Danaher management has prohibited Archer Dental (which Danaher restricted to selling in the State of Texas as the result of the illegal conspiracy and boycott described above) from competing with Schein or other horizontal competitors in the State of Texas on threat of termination. As a result, Archer Dental is

harmed and Texas dental professionals are denied the benefit of competition.

64. These agreements are *per se* violations of Texas Free Enterprise and Antitrust Act ("TFEAA"). More specifically, elimination, by joint collaborative action, of discounters from access to the market is a *per se* violation of the TFEAA. The participation in the agreement by Danaher, the common supplier to both Defendants and Plaintiff, does not change the character of the conspiracy. Indeed, a conspiracy is horizontal in nature when a number of competitor firms agree with each other and at least one of their common suppliers or manufacturers to eliminate their price-cutting competition by cutting his access to supplies.

65. The agreements that Defendants and Company X have entered, maintained, renewed and enforced with one another have had the purpose and effect of eliminating competition for the sale of dental equipment by and among dealers of dental equipment and maintaining prices for such equipment above competitive levels. Furthermore, as the result of Defendants' and Company X's conduct, dentists in Texas have been deprived of the competition offered by Archer Dental and have overpaid for dental equipment.

66. As a direct and proximate result of Defendants' and Company X's past and continuing violations of the TFEAA, Plaintiff has suffered injury and damages in an amount to be proved at trial.

67. Plaintiff seeks money damages from Defendants jointly and severally for these violations. Defendants' and Company X's violations were willful and flagrant. Plaintiff's actual damages should therefore be trebled under Section 15.21 of the TFEAA.

68. Plaintiff also seeks injunctive relief. The violations set forth above are continuing and will continue unless injunctive relief is granted.

69. As required by Section 15.21(c) of the TFEAA, a copy of this Complaint, shall be mailed to the Attorney General of Texas.

JURY TRIAL DEMANDED

Plaintiff demands a trial by jury pursuant to FED. R. CIV. P. 38(b) of all issues triable of right by jury.

PRAYER FOR RELIEF

Therefore, plaintiff demands judgment as follows:

a. Adjudge and declare that Defendants have engaged in unlawful conduct in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1;

b. Adjudge and declare that Defendants have engaged in unlawful conduct in violation of Section 15.05(a) of the TFEAA, TEX. BUS & COMM. CODE, §15.05(a);

c. Preliminarily and permanently enjoin Defendants from violating Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 15.05(a) of the TFEAA, TEX. BUS & COMM. CODE, § 15.05(a);

d. Against all Defendants, jointly and severally, award Plaintiff damages in an amount to be proved at trial, to be trebled with interest and the costs of this suit, including attorney's fees; and

e. Award such other further relief as the Court deems just and proper.

Dated: August 31, 2012

Respectfully submitted

/s/ Jerry L. Beane
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ATTORNEYS FOR PLAINTIFF
ARCHER AND WHITE SALES, INC.

DEALER AGREEMENT

This Dealer Agreement (this "Agreement") dated as of October 4, 2007, is made by and between Pelton & Crane ("Pelton & Crane") and Archer and White Sales ("Dealer").

RECITALS

A. Pelton & Crane manufactures and sells Pelton & Crane brand dental equipment and products (the "Products").

B. Pelton & Crane wishes to sell the Products to dealers who demonstrate their ability to sell the Products in a professional manner that will preserve and enhance the valuable reputationand goodwill associated with the Products.

C. Dealer wishes to serve as a Pelton & Crane dealer authorized to sell the Products.

AGREEMENT

The parties agree as follows:

1. DEALER APPOINTMENT

Pelton & Crane appoints Dealer as a nonexclusive authorized dealer for sale of the Products in the previously agreed-upon geographic sales territory subject to the terms and conditions set forth herein. Dealer accepts such appointment.

2. DEALER OBLIGATIONS

2.1 Dealer shall use its best efforts to sell the Products and to encourage the purchase of the Products by Dealer's customers.

2.2 Deaer shall sell the Products only to: (a) licensed doctors of dental medicine; (b) accredited and/or licensed dental or medical clinics and hospitals; (c) accredited dental and medical schools; and (d) appropriate agencies of the federal, state provincial, or local governments (collectively referred to herein as "Qualified Customers").

2.3 Dealer shall sell the Products only to Qualified Customers having their principal place of business: (a) within the previously agreed-upon geographic sales territory; (b) within the geographic area where Dealer's sales force makes regular face-to-face visits and Dealer's sercice staff performs service; and (c) within a reasonable distance of an authorized outlet showroom that displays the Products.

2.4 Dealer shall not, directly or indirectly, sell the Products by mail order.

2.5 Dealer shall not sell the products to any customer for resale. If Dealer learns of a resale by any of its customers, Dealer shall immediately notify Pelton & Crane.

2.6 Dealer shall employ and maintainits own full-time, experienced and knowledgeable sales staff that regularly makes face-to-face sales visits and presentations to customers and potential customers within Dealer's geographic area. Dealer shall train its sales personnel concerning the products and their speciications. Features, and benefits. Dealer shall perform such obligations only through Dealer's own employees, and not through independent contractors.

2.7 Dealer shall make time available during Dealer's sales meetings for Pelton & Crane representatives to present information regarding the Products.

Dealer agrees to conduct such sales meetings at least once every six months.

2.8 Dealer shall maintain at each authorized outlet a showroom for which it shall purchase and in which it shall display the Products according to Pelton & Crane's flooring and display programs. Pelton & Crane may change its flooring and display programs from time to time.

2.9 Dealer shall maintain records of each sale of the Products including the name and address of the purchaser, date of purchase, date of installation, and the model and serial numbers of the Products. Dealer shall deliver a copy of all such information to Pelton & Crane at no charge. Dealer shall not remove any serial numbers.

2.10 Dealer shall provide customer service including installation, instruction of Dealer's customers in the use of Products, warranty service, Product repairs, and other post-sale service. Dealer shall document all Product repairs, Product service, and customer complaints and forward all customer complaint information to Pelton & Crane.

2.11 Dealer shall employ and maintain its own full-time, experienced and knowledgeable service staff sufficiently trained to properly install and service the Products. Dealer shall adequately train their service personnel for service and installation as well as insure the individual(s) providing the training are adequately trained themselves prior to providing any such training. Upon Pelton & Crane's request, provide installation and service training records of service staff. Dealear shall nt install, service, or maintain any of the Products by any person who is unqualified to perform such work.

2.12 Dealer shall purchase and maintain an inventory of spare parts sufficient to enable Dealer to promptly service the Products.

2.13 Dealer shall comply with all laws and regulations pertaining to the sale, assembly, installation and service of the Products by Dealer.

2.14 Dealer shall maintainsufficient product liability and other all risk liability insurance adequate to protect all risks associated with the sale, installation and service of the Products and, upon Pelton & Crane's request, provide Pelton & Crane with an insurance certificate or other evidence of insurance in form and in amounts satisfactory to Pelton & Crane.

2.15 Dealer shall take no action which wil cause Pelton & Crane to be in violation of any law of any jurisdiction in the Territory or the United States, such laws including but not limited to the U.S. Foreign Corrupt Practices Act, the U.S. export control laws and the U.S. antiboycott laws. In this conjunction, Distributor agrees:

1.) To inform all customers that all Products are subject to the Unied States Export Administration Regulations. The following statement shown on invoices, packing lists, and bills of lading may be used for this purpose.

> "These commodities, technology or software were exported from the United States in accourdance with the Export Administration Regulations. Diversion contrary to the Unite States law prohibited."

2.) To provide, upon request by Pelton & Crane, information by Pelton & Crane to obtain U.S. export licenses, including but not limited to formal end-use statements (Statemens by Ultimate Consignee and Purchaser).

3.) To maintain all records relating to sale of the Porducts for not less than five (5) years;

4.) To comply with applicable laws of the Territory relating to the conduct of Distributor's business, including any requirements for registration or recording of this Agreement with governmental entities;

5.) Not to sell Products to customers listed on the current United States Department of Commerce Denied Persons List which shall be provided to Distributorperiodically; and

6.) Not to supply any boycott related information concerning Pelton & Crane.

2.16 Dealer distributing product within the European Union (EU) has the responsibility of registering the product with a "Prodcuer Compliance Scheme" in each country within the EU that product is shipped to in accordance with Directive 2002/96/EC of the European Parliament and the Council of 27 January 2003 on Waste Electrical and Electronic Equipment (WEEE) and liable for all costs associated with WEEE compliance.

3. MULTIPLE LOCATION DEALERS

If Dealer sells Products through more than one outlet, the obligations of Dealer set forth in this Agreement shall apply to each such outlet. Current authorized Dealer outlets are listed on exhibit A attached hereto. Additional outlets may be authorized only by the prior written agreement of Pelton & crane.

4. PELTON & CRANE OBLIGATIONS

4.1 Pelton & Crane shall offer to sell Products to Dealer in accordance with the terms of this Agreement and Pelton & Crane's Terms and Conditions of Sale.

4.2 Pelton & Crane shall furnish to Dealer reasonable quantities of price lists, sales catalogs, installation instructions and service manuals to support Dealer's efforts to sell and service the Products.

5. TERMS AND CONDITIONS OF SALE

All sales of Products by Pelton & Crane shall be subject to Pelton & Crane's Terms and Conditions of Sale, incorporated herein by this reference. Pelton & Crane may change its Terms and Conditions of Sale from time to time by giving notice to Dealer. Dealer shall pay for Products pursuant to the Pelton & Crane Terms and Conditions of Sale.

6. MINIMUM SALES GOALS

[Minimum sales goals for Dealer for the initial twelve (12)-month term of this Agreement are set forth in Exibit B, attached hereto and incorporated herein by this reference.] [Pelton & Crane may establish minimum annual sales goals for Dealer.] Pelton & Crane may adjust the minimum sales goal for Dealer from time to time.

7. NONEXCLUSIVE APPOINTMENT; PELTON & CRANE SALES

7.1 Dealer's appointment is nonexclusive. Pelton & Crane reserves the right to increase or decrease thenumber of authorized dealers for the Products in the vicinity of Dealer's outlet or outlets without prior notice to Dealer.

7.2 Pelton & Crane reserves the right to sell the Products directly to government agencies, dental schools, clinics, hospitals, original equipment manufacturers ("OEMs"), value-added resellers ("VARs"), ditributors and other "house accounts" of Pelton & Crane.

8. TRADEMARKS

Dealer acknowledges that Pelton &Crane owns all rights to the trademarks "Pelton & Crane™", and other logos, trademarks, service marks, trade names and design marks used by Pelton & Crane. Dealer shall not use any Pelton & Crane mark except in advertising or selling the Products and in a manner approved by Pelton & Crane. Upon terminaton of this Agreement, Dealer shall cease all use of Pelton & Crane's marks.

9. LIMITED WARRANTY AND DISCLAIMER

9.1 Each of the Products is warranted by Pelton & Crane in accordance with Pelton & Crane's warranty applicable to such Product set forth in the Pelton & Crane Terms and Conditions of Sale, product warranty registration card, or other Pelton & Crane literature pertaining to such Product.

9.2 EXCEPT FOR THE EXPRESS WARRANTY DESCRIBED IN SECTIONI 9.1 OF THIS AGREEMENT, Pelton & Crane MAKES NO WARRANTY, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY WARRANTY OR MECHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, DESIGN OR SUITABILITY WITH RESPECT TO THE PRODUCTS OR ANY OTHER GOODS, SERVICES OR OTHER MATERIALS PROVEDED BY Pelton & Crane.

10. LIMITATION OF REMEDIES AND LIABILITY

10.1 Pelton & Crane SHALL NOT BE LIABLE TO DEALER OR ANY PERSON FOR Pelton & Crane's FAILURE TO ACCEPT OR FILL ANY ORDER, FOR ERRORS IN FILLIN ANY ORDER, OR FOR ANY DELAY IN DELIVERY.

10.2 Pelton & Crane SHALL NOT BE LIABLE FOR THE COST FO SUBSTITUTE GOODS, LOSS OF PROFITS, OR FOR ANY INDIRECT, SPECIAL, CONSEQUENTIAL, INCIDENTAL OR PUNITIVE DAMAGES, WHETHER BASED ON CONTRACT, TORT, OR ANY OTHER LEGAL THEORY, EVEN IF Pelton & Crane WAS ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

10.3 The liability of Pelton & Crane for any and all claims related to or arising out of this Agreement or any Products provided by Pelton & Crane shall be limited to the amount paid by Dealer to Pelton & Crane (for the purchase of Products) during the period of twelve (12) months immediately preceding the date on which any such claim is asserted against Pelton & Crane.

11. TERM AND TERMINATION

11.1 The term of this Agreement shall be effective as of the date set forth in the introductory paragraph and shall continue until terminated as described below unless termeinated earlier pursuant to the provisions in this Agreement.

11.2 Either party may terminate this Agreement immediately: (a) upon breach of this Agreement by the other party if the breach is not cured within ten (10) days after written notice of such breach is given or, (b) upon either party's insolvency, bankruptcy or suspension of business.

11.3 Either party may terminate this Agreement for any reason or no reason by giving 60 days' prior written notice to the other party.

11.4 Sections 8, 9, 10, 12.6, 12.7, and 12.8, and all other provisions of this Agreement which may reasonably

be interpreted or construed as surviving the expiration, termination or cencellation of this Agreement, shall survive the expiration, termination or cancellation of this Agreement.

12. GENERAL PROVISIONS

12.1 Financial Statement. Dealer wil from time to time, upon request by Pelton & Crane, furnish financial statements and information relating to its financial condition, including its current net worth.

12.2 Nonassignment. Dealer will not, directly or indirectly (throught a transfer of ownership of Dealer or otherwise) assign, transfer, or sell its rights under this Agreement, or delegate its duties hereunder, without prior written consent of Pelton & Crane.

12.3 Independent Dealer. Dealer is an independent business and has no authority (nor will Dealer represent that Dealer has any authority) to bind Pelton& Crane or to assume or to create any obligation, express or implied, on behalf of Pelton & Crane. Nothing in this Agreement shall be construed as constituting Dealer and Pelton & Crane as partners, or as creating relationships of employer and employee or principal and agent between the parties.

12.4 Modification. This Agreement (together with the Pelton & Crane Terms and Conditions of Sale) contains the entire agreement between the parties. Unless otherwise provided in this Agreement, no modification of this Agreement shall be binding upon the parties unless made in writing and signed by both parties.

12.5 Waiver. Pelton & Crane may waive any obligation Dealer has under this Agreement, but such a waiver shall not be effective unless made in writing.

12.6 Indemnification. Dealer will indemnify and hold Pelton & Crane, its officers, directors, agents, emplyoees, and affiliates harmless from any claims, demands, loss, damage, liability, or expense, including attorneys' fees and expenses, arising out of the acts or omissions of Dealer, its agents or employees.

12.7 Attorneys'Fees. In the event any suit or action is brought to enforce or interpret any terms of this Agreement, the prevailing party shall be entitled to recover reasonable attorneys' fees and expenses incurred by it in connection therewith.

12.8 Disputes. This Agreement shall be governed by the laws of the state of North Carolina. Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets or other intellectual property of Pelton & Crane) shall be resolved by binding arbitraton in accordance with the arbitration rules of the American Arbitration Association. The Place of arbitration shall be in Charlotte, North Carolina.

12.9 Notices. Notices shall be deemed given if delivered personally or sent by first class mail, postage prepaid, addressed to the other party at the address set forth in this Agreement or at such other address as designated by the party by written notice.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date set forth above.

Pelton & Crane	Dealer:
By: _____	By: Jim Archer
Title: VP Sales	Title: President
Address: 11727 Fruehauf Drive Charlotte, NC 28273	Address: 1107 Summit Plano TX 75074

EXHIBIT A
TO
DEALER AGREEMENT
FOR

Archer and White Sales

Addresses of Authorized dealer outlets

Archer & White Sales
1107 Summit Ave
Plano, TX 75074

Dynamic Dental Solutions
89 E. 530 Road
Pryor, OK 74361

EXHIBIT B
TO
DEALER AGREEMENT
FOR

Archer and White Sales

Minimum Annual Sales Goal
N/A

Commercial Arbitration Rules and Mediation Procedures

Including Procedures for Large, Complex Commercial Disputes

Rules Amended and Effective June 1, 2009
Fee Schedule Amended and Effective June 1, 2010

American Arbitration Association
Dispute Resolution Service Worldwide

www.adr.org

Commercial Arbitration Rules and Mediation Procedures

Important Notice

These rules and any amendment of them shall apply in the form in effect at the time the administrative filing requirements are met for a demand for arbitration or submission agreement received by the AAA. To ensure that you have the most current information, see our websiteat www.adr.org.

Introduction

Each year, many millions of business transactions take place. Occasionally, disagreements develop over these business transactions. Many of these disputes are resolved by arbitration, the voluntary submission of a dispute to an impartial person or persons for final and binding determination. Arbitration has proven to be an effective way to resolve these disputes privately, promptly, and economically.

The American Arbitration Association (AAA), a not-for-profit, public service organization, offers a broad range of dispute resolution services to business executives, attorneys, individuals, trade associations, unions, management, consumers, families, communities, and all levels of government. Services are available through AAA headquarters in New York and through offices located in major cities throughout the United States. Hearings may be held at locations convenient for the parties and are not limited to cities with AAA offices. In addition, the AAA serves as a center for education and training, issues specialized publications, and conducts research on all forms of out-ofcourt dispute settlement.

Standard Arbitration Clause

The parties can provide for arbitration of future disputes by inserting the following clause into their contracts:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Arbitration of existing disputes may be accomplished by use of the following:

We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules the following controversy: (describe briefly) We further agree that the above controversy be submitted to (one) (three) arbitrator(s). We further agree that we will faithfully observe this agreement and the rules, that we will abide by and perform any award rendered by the arbitrator(s), and that a judgment of any court having jurisdiction may be entered on the award.

In transactions likely to require emergency interim relief, the parties may wish to add to their clause the following language:

The parties also agree that the AAA Optional Rules for Emergency Measures of Protection shall apply to the proceedings.

These Optional Rules may be found on page 49.

The services of the AAA are generally concluded with the transmittal of the award. Although there is voluntary compliance with the marjority of awards, judgment on the

award can be entered in a court having appropriate jurisdiction if necessary.

Administrative Fees

The AAA charges a filing fee based on the amount of the claim or counterclaim. This fee information, which is included with these rules, allows the parties to exercise control over their administrative fees. The fees cover AAA administrative services; they do not cover arbitrator compensation or expenses, if any, reporting services, or any post-award charges incurred by the parties in enforcing the award.

Mediation

The parties might wish to submit their dispute to mediation prior to arbitration. In mediation, the neutral mediator assists the parties in reaching a settlement but does not have the authority to make a binding decision or award. Mediation is administered by the AAA in accordance with its Commercial Mediation Procedures. There is no additional administrative fee where parties to a pending arbitration attempt to mediate their dispute under the AAA's auspices.

If the parties want to adopt mediation as a part of their contractual dispute settlement procedure, they can insert the following mediation clause into their contract in conjunction with a standard arbitration provision:

If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute *by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration, litigation, or some other dispute resolution procedure.*

If the parties want to use a mediator to resolve an existing dispute, they can enter into the following submission:existing dispute, they can enter into the following submission:

The parties hereby submit the following dispute to mediation administered by the American Arbitration Association under its Commercial Mediation Procedures. (The clause may also provide for the qualifications of the mediator(s), method of payment, locale of meetings, and any other item of concern to the parties.)

Large, Complex Cases

Unless the parties agree otherwise, the Procedures for Large, Complex Commercial Disputes, which appear in this pamphlet, will be applied to all cases administered by the AAA under the Commercial Arbitration Rules in which the disclosed claim or counterclaim of any party is at least $500,000 exclusive of claimed interest, arbitration fees and costs.

The key features of these procedures include:

> a highly qualified, trained Roster of Neutrals;

> a mandatory preliminary hearing with the arbitrators, which may be conducted by teleconference;

> broad arbitrator authority to order and control discovery, including depositions;

> presumption that hearings will proceed on a consecutive or block basis.

Commercial Mediation Procedures

M-1. Agreement of Parties

Whenever, by stipulation or in their contract, the parties have provided for mediation or conciliation of existing

or future disputes under the auspices of the American Arbitration Association (AAA) or under these procedures, the parties and their representatives, unless agreed otherwise in writing, shall be deemed to have made these procedural guidelines, as amended and in effect as of the date of filing of a request for mediation, a part of their agreement and designate the AAA as the administrator of their mediation.

The parties by mutual agreement may vary any part of these procedures including, but not limited to, agreeing to conduct the mediation via telephone or other electronic or technical means.

M-2. Initiation of Mediation

Any party or parties to a dispute may initiate mediation under the AAA's auspices by making a request for mediation to any of the AAA's regional offices or case management centers via telephone, email, regular mail or fax. Requests for mediation may also be filed online via AAA WebFile at **www.adr.org**.

The party initiating the mediation shall simultaneously notify the other party or parties of the request. The initiating party shall provide the following information to the AAA and the other party or parties as applicable:

(i) A copy of the mediation provision of the parties' contract or the parties' stipulation to mediate.

(ii) The names, regular mail addresses, email addresses and telephone numbers of all parties to the dispute and representatives, if any, in the mediation.

(iii) A brief statement of the nature of the dispute and the relief requested.

(iv) Any specific qualifications the mediator should possess.

Where there is no pre-existing stipulation or contract by which the parties have provided for mediation of existing or future disputes under the auspices of the AAA, a party may request the AAA to invite another party to participate in "mediation by voluntary submission." Upon receipt of such a request, the AAA will contact the other party or parties involved in the dispute and attempt to obtain a submission to mediation.

M-3. Representation

Subject to any applicable law, any party may be represented by persons of the party's choice. The names and addresses of such persons shall be communicated in writing to all parties and to the AAA.

M-4. Appointment of the Mediator

Parties may search the online profiles of the AAA's Panel of Mediators at **www.aaamediation.com** in an effort to agree on a mediator. If the parties have not agreed to the appointment of a mediator and have not provided any other method of appointment, the mediator shall be appointed in the following manner:

(i) Upon receipt of a request for mediation, the AAA will send to each party a list of mediators from the AAA's Panel of Mediators. The parties are encouraged to agree to a mediator from the submitted list and to advise the AAA of their agreement.

(ii) If the parties are unable to agree upon a mediator, each party shall strike unacceptable names from the list, number the remaining names in order of preference and return the list to the AAA. If a

party does not return the list within the time specified, all mediators on the list shall be deemed acceptable. From among the mediators who have been mutually approved by the parties, and in accordance with the designated order of mutual preference, the AAA shall invite a mediator to serve.

(iii) If the parties fail to agree on any of the mediators listed, or if acceptable mediators are unable to serve, or if for any other reason the appointment cannot be made from the submitted list, the AAA shall have the authority to make the appointment from among other members of the Panel of Mediators without the submission of additional lists.

M-5. Mediator's Impartiality and Duty to Disclose

AAA mediators are required to abide by the *Model Standards of Conduct for Mediators* in effect at the time a mediator is appointed to a case. Where there is a conflict between the Model Standards and any provision of these Mediation Procedures, these Mediation Procedures shall govern. The Standards require mediators to (i) decline a mediation if the mediator cannot conduct it in an impartial manner, and (ii) disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality.

Prior to accepting an appointment, AAA mediators are required to make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for the mediator. AAA mediators are required to disclose any circumstance likely to create a presumption of bias or prevent a resolution of the parties' dispute within the time-frame desired by the parties. Upon

receipt of such disclosures, the AAA shall immediately communicate the disclosures to the parties for their comments.

The parties may, upon receiving disclosure of actual or potential conflicts of interest of the mediator, waive such conflicts and proceed with the mediation. In the event that a party disagrees as to whether the mediator shall serve, or in the event that the mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, the mediator shall be replaced.

M-6. Vacancies

If any mediator shall become unwilling or unable to serve, the AAA will appoint another mediator, unless the parties agree otherwise, in accordance with section M-4.

M-7. Duties and Responsibilities of the Mediator

(i) The mediator shall conduct the mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.

(ii) The mediator is authorized to conduct separate or *ex parte* meetings and other communications with the parties and/or their representatives, before, during and after any scheduled mediation conference. Such communications may be conducted via telephone, in writing, via email, online, in person or otherwise.

(iii) The parties are encouraged to exchange all documents pertinent to the relief requested. The mediator may request the exchange of memoranda on issues, including the underlying interests and the history of the parties' negotiations. Information

that a party wishes to keep confidential may be sent to the mediator, as necessary, in a separate communication with the mediator.

(iv) The mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute. Subject to the discretion of the mediator, the mediator may make oral or written recommendations for settlement to a party privately or, if the parties agree, to all parties jointly.

(v) In the event a complete settlement of all or some issues in dispute is not achieved within the scheduled mediation session(s), the mediator may continue to communicate with the parties, for a period of time, in an ongoing effort to facilitate a complete settlement.

(vi) The mediator is not a legal representative of any party and has no fiduciary duty to any party.

M-8. Responsibilities of the Parties

The parties shall ensure that appropriate representatives of each party, having authority to consummate a settlement, attend the mediation conference.

Prior to and during the scheduled mediation conference session(s) the parties and their representatives shall, as appropriate to each party's circumstances, exercise their best efforts to prepare for and engage in a meaningful and productive mediation.

M-9. Privacy

Mediation sessions and related mediation communications are private proceedings. The parties and their rep-

resentatives may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the mediator.

M-10. Confidentiality

Subject to applicable law or the parties' agreement, confidential information disclosed to a mediator by the parties or by other participants (witnesses) in the course of the mediation shall not be divulged by the mediator. The mediator shall maintain the confidentiality of all information obtained in the mediation, and all records, reports or other documents received by a mediator while serving in that capacity shall be confidential.

The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum.

The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial or other proceeding the following, unless agreed to by the parties or required by applicable law:

(i) Views expressed or suggestions made by a party or other participant with respect to a possible settlement of the dispute,

(ii) Admissions made by a party or other participant in the course of the mediation proceedings,

(iii) Proposals made or views expressed by the mediator or

(iv) The fact that a party had or had not indicated willingness to accept a proposal for settlement made by the mediator.

M-11. No Stenographic Record

There shall be no stenographic record of the mediation process.

M-12. Termination of Mediation

The mediation shall be terminated:

(i) By the execution of a settlement agreement by the parties; or

(ii) By a written or verbal declaration of the mediator to the effect that further efforts at mediation would not contribute to a resolution of the parties' dispute; or

(iii) By a written or verbal declaration of all parties to the effect that the mediation proceedings are terminated; or

(iv) When there has been no communication between the mediator and any party or party's representative for 21 days following the conclusion of the mediation conference.

M-13. Exclusion of Liability

Neither the AAA nor any mediator is a necessary party in judicial proceedings relating to the mediation. Neither the AAA nor any mediator shall be liable to any party for any error, act or omission in connection with any mediation conducted under these procedures.

M-14. Interpretation and Application of Procedures

The mediator shall interpret and apply these procedures insofar as they relate to the mediator's duties and responsibilities. All other procedures shall be interpreted and applied by the AAA.

M-15. Deposits

Unless otherwise directed by the mediator, the AAA will require the parties to deposit in advance of the mediation conference such sums of money as it, in consultation with the mediator, deems necessary to cover the costs and expenses of the mediation and shall render an accounting to the parties and return any unexpended balance at the conclusion of the mediation.

M-16. Expenses

All expenses of the mediation, including required traveling and other expenses or charges of the mediator, shall be borne equally by the parties unless they agree otherwise. The expenses of participants for either side shall be paid by the party requesting the attendance of such participants.

M-17. Cost of the Mediation

There is no filing fee to initiate a mediation or a fee to request the AAA to invite parties to mediate.

The cost of mediation is based on the hourly mediation rate published on the mediator's AAA profile. This rate covers both mediator compensation and an allocated portion for the AAA's services. There is a four-hour minimum charge for a mediation conference. Expenses referenced in section M-16 may also apply.

If a matter submitted for mediation is withdrawn or cancelled or results in a settlement after the agreement to mediate is filed but prior to the mediation conference, the cost is $250 plus any mediator time and charges incurred.

The parties will be billed equally for all costs unless they agree otherwise.

If you have questions about mediation costs or services visit our website at **www.adr.org** or contact your local AAA office.

Conference Room Rental

The costs described do not include the use of AAA conference rooms. Conference rooms are available on a rental basis. Please contact your local AAA office for availability and rates.

Commercial Arbitration Rules

R-1. Agreement of Parties*+

(a) The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules. These rules and any amendment of them shall apply in the form in effect at the time the administrative requirements are met for a demand for arbitration or submission agreement received by the AAA. The parties, by written agreement, may vary the procedures set forth in these rules. After appointment of the arbitrator, such modifications may be made only with the consent of the arbitrator.

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* The AAA applies the Supplementary Procedures for Consumer-Related Disputes to arbitration clauses in agreements between individual consumers and businesses where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are nonnegotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use. The AAA will have the discretion to apply or not to apply the supplementary procedures and the parties will be able to bring any disputes concerning the application or non-application to the attention of the arbitrator. Consumers are not prohibited from seeking relief in a small claims court for disputes or claims within the scope of its jurisdiction, even in consumer arbitration cases filed by the business.

+ A dispute arising out of an employer promulgated plan will be administered under the AAA's Employment Arbitration Rules and Mediation Procedures.

(b) Unless the parties or the AAA determines otherwise, the Expedited Procedures shall apply in any case in which no disclosed claim or counterclaim exceeds $75,000, exclusive of interest and arbitration fees and costs.

Parties may also agree to use these procedures in larger cases. Unless the parties agree otherwise, these procedures will not apply in cases involving more than two parties. The Expedited Procedures shall be applied as described in Sections E-1 through E-10 of these rules, in addition to any other portion of these rules that is not in conflict with the Expedited Procedures.

(c) Unless the parties agree otherwise, the Procedures for Large, Complex Commercial Disputes shall apply to all cases in which the disclosed claim or counterclaim of any party is at least $500,000, exclusive of claimed interest, arbitration fees and costs. Parties may also agree to use the procedures in cases involving claims or counterclaims under $500,000, or in nonmonetary cases. The Procedures for Large, Complex Commercial Disputes.

(d) All other cases shall be administered in accordance with Sections R-1 through R-54 of these rules.

R-2. AAA and Delegation of Duties

When parties agree to arbitrate under these rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these rules, they thereby authorize the AAA to administer the arbitration. The authority and duties of the AAA are prescribed in the agreement of the parties and in these rules, and may be carried out through such of the AAA's representatives as it may

direct. The AAA may, in its discretion, assign the administration of an arbitration to any of its offices.

R-3. National Roster of Arbitrators

The AAA shall establish and maintain a National Roster of Commercial Arbitrators ("National Roster") and shall appoint arbitrators as provided in these rules. The term "arbitrator" in these rules refers to the arbitration panel, constituted for a particular case, whether composed of one or more arbitrators, or to an individual arbitrator, as the context requires.

R-4. Initiation under an Arbitration Provision in a Contract

(a) Arbitration under an arbitration provision in a contract shall be initiated in the following manner:

(i) The initiating party (the "claimant") shall, within the time period, if any, specified in the contract(s), give to the other party (the "respondent") written notice of its intention to arbitrate (the "demand"), which demand shall contain a statement setting forth the nature of the dispute, the names and addresses of all other parties, the amount involved, if any, the remedy sought, and the hearing locale requested.

(ii) The claimant shall file at any office of the AAA two copies of the demand and two copies of the arbitration provisions of the contract, together with the appropriate filing fee as provided in the schedule included with these rules.

(iii) The AAA shall confirm notice of such filing to the parties.

(b) A respondent may file an answering statement in duplicate with the AAA within 15 days after confirmation of notice of filing of the demand is sent by the AAA. The respondent shall, at the time of any such filing, send a copy of the answering statement to the claimant. If a counterclaim is asserted, it shall contain a statement setting forth the nature of the counterclaim, the amount involved, if any, and the remedy sought. If a counterclaim is made, the party making the counterclaim shall forward to the AAA with the answering statement the appropriate fee provided in the schedule included with these rules.

(c) If no answering statement is filed within the stated time, respondent will be deemed to deny the claim. Failure to file an answering statement shall not operate to delay the arbitration.

(d) When filing any statement pursuant to this section, the parties are encouraged to provide descriptions of their claims in sufficient detail to make the circumstances of the dispute clear to the arbitrator.

R-5. Initiation under a Submission

Parties to any existing dispute may commence an arbitration under these rules by filing at any office of the AAA two copies of a written submission to arbitrate under these rules, signed by the parties. It shall contain a statement of the nature of the dispute, the names and addresses of all parties, any claims and counterclaims, the amount involved, if any, the remedy sought, and the hearing locale requested, together with the appropriate filing fee as provided in the schedule included with these rules. Unless the parties state otherwise in the submission, all

claims and counterclaims will be deemed to be denied by the other party.

R-6. Changes of Claim

After filing of a claim, if either party desires to make any new or different claim or counterclaim, it shall be made in writing and filed with the AAA. The party asserting such a claim or counterclaim shall provide a copy to the other party, who shall have 15 days from the date of such transmission within which to file an answering statement with the AAA. After the arbitrator is appointed, however, no new or different claim may be submitted except with the arbitrator's consent.

R-7. Jurisdiction

(a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

(b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

(c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

R-8. Mediation

At any stage of the proceedings, the parties may agree to conduct a mediation conference under the Commercial Mediation Procedures in order to facilitate settlement. The mediator shall not be an arbitrator appointed to the case. Where the parties to a pending arbitration agree to mediate under the AAA's rules, no additional administrative fee is required to initiate the mediation.

R-9. Administrative Conference

At the request of any party or upon the AAA's own initiative, the AAA may conduct an administrative conference, in person or by telephone, with the parties and/or their representatives. The conference may address such issues as arbitrator selection, potential mediation of the dispute, potential exchange of information, a timetable for hearings and any other administrative matters.

R-10. Fixing of Locale

The parties may mutually agree on the locale where the arbitration is to be held. If any party requests that the hearing be held in a specific locale and the other party files no objection thereto within 15 days after notice of the request has been sent to it by the AAA, the locale shall be the one requested. If a party objects to the locale requested by the other party, the AAA shall have the power to determine the locale, and its decision shall be final and binding.

R-11. Appointment from National Roster

(a) If the parties have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed in the following manner: The AAA shall send simultaneously to each party to the dispute an identical list

of 10 (unless the AAA decides that a different number is appropriate) names of persons chosen from the National Roster. The parties are encouraged to agree to an arbitrator from the submitted list and to advise the AAA of their agreement.

(b) If the parties are unable to agree upon an arbitrator, each party to the dispute shall have 15 days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the National Roster without the submission of additional lists.

(c) Unless the parties agree otherwise when there are two or more claimants or two or more respondents, the AAA may appoint all the arbitrators.

R-12. Direct Appointment by a Party

(a) If the agreement of the parties names an arbitrator or specifies a method of appointing an arbitrator, that designation or method shall be followed. The notice of appointment, with the name and address of the arbitrator, shall be filed with the AAA by the

appointing party. Upon the request of any appointing party, the AAA shall submit a list of members of the National Roster from which the party may, if it so desires, make the appointment.

(b) Where the parties have agreed that each party is to name one arbitrator, the arbitrators so named must meet the standards of Section R-17 with respect to impartiality and independence unless the parties have specifically agreed pursuant to Section R-17(a) that the party-appointed arbitrators are to be non-neutral and need not meet those standards.

(c) If the agreement specifies a period of time within which an arbitrator shall be appointed and any party fails to make the appointment within that period, the AAA shall make the appointment.

(d) If no period of time is specified in the agreement, the AAA shall notify the party to make the appointment. If within 15 days after such notice has been sent, an arbitrator has not been appointed by a party, the AAA shall make the appointment.

R-13. Appointment of Chairperson by Party-Appointed Arbitrators or Parties

(a) If, pursuant to Section R-12, either the parties have directly appointed arbitrators, or the arbitrators have been appointed by the AAA, and the parties have authorized them to appoint a chairperson within a specified time and no appointment is made within that time or any agreed extension, the AAA may appoint the chairperson.

(b) If no period of time is specified for appointment of the chairperson and the party-appointed arbitrators or the parties do not make the appointment within 15 days from the date of the appointment of the last party-appointed arbitrator, the AAA may appoint the chairperson.

(c) If the parties have agreed that their party-appointed arbitrators shall appoint the chairperson from the National Roster, the AAA shall furnish to the party-appointed arbitrators, in the manner provided in Section R-11, a list selected from the National Roster, and the appointment of the chairperson shall be made as provided in that section.

R-14. Nationality of Arbitrator

Where the parties are nationals of different countries, the AAA, at the request of any party or on its own initiative, may appoint as arbitrator a national of a country other than that of any of the parties. The request must be made before the time set for the appointment of the arbitrator as agreed by the parties or set by these rules.

R-15. Number of Arbitrators

If the arbitration agreement does not specify the number of arbitrators, the dispute shall be heard and determined by one arbitrator, unless the AAA, in its discretion, directs that three arbitrators be appointed. A party may request three arbitrators in the demand or answer, which request the AAA will consider in exercising its discretion regarding the number of arbitrators appointed to the dispute.

R-16. Disclosure

(a) Any person appointed or to be appointed as an arbitrator shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration.

(b) Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others.

(c) In order to encourage disclosure by arbitrators, disclosure of information pursuant to this Section R-16 is not to be construed as an indication that the arbitrator considers that the disclosed circumstance is likely to affect impartiality or independence.

R-17. Disqualification of Arbitrator

(a) Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for:

(i) partiality or lack of independence,

(ii) inability or refusal to perform his or her duties with diligence and in good faith, and

(iii) any grounds for disqualification provided by applicable law. The parties may agree in writing, however, that arbitrators directly appointed by a party pursuant to Section R-12 shall be

nonneutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence.

(b) Upon objection of a party to the continued service of an arbitrator, or on its own initiative, the AAA shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the parties of its decision, which decision shall be conclusive.

R-18. Communication with Arbitrator

(a) No party and no one acting on behalf of any party shall communicate ex parte with an arbitrator or a candidate for arbitrator concerning the arbitration, except that a party, or someone acting on behalf of a party, may communicate ex parte with a candidate for direct appointment pursuant to Section R-12 in order to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate's qualifications, availability, or independence in relation to the parties or to discuss the suitability of candidates for selection as a third arbitrator where the parties or partydesignated arbitrators are to participate in that selection.

(b) Section R-18(a) does not apply to arbitrators directly appointed by the parties who, pursuant to Section R-17(a), the parties have agreed in writing are non-neutral. Where the parties have so agreed under Section R-17(a), the AAA shall as an administrative practice suggest to the parties that they agree further that Section R-18(a) should nonetheless apply prospectively.

R-19. Vacancies

(a) If for any reason an arbitrator is unable to perform the duties of the office, the AAA may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of these rules.

(b) In the event of a vacancy in a panel of neutral arbitrators after the hearings have commenced, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy, unless the parties agree otherwise.

(c) In the event of the appointment of a substitute arbitrator, the panel of arbitrators shall determine in its sole discretion whether it is necessary to repeat all or part of any prior hearings.

R-20. Preliminary Hearing

(a) At the request of any party or at the discretion of the arbitrator or the AAA, the arbitrator may schedule as soon as practicable a preliminary hearing with the parties and/or their representatives. The preliminary hearing may be conducted by telephone at the arbitrator's discretion.

(b) During the preliminary hearing, the parties and the arbitrator should discuss the future conduct of the case, including clarification of the issues and claims, a schedule for the hearings and any other preliminary matters.

R-21. Exchange of Information

(a) At the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of arbitration, the arbitrator may direct

(i) the production of documents and other information, and

(ii) the identification of any witnesses to be called.

(b) At least five business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing.

(c) The arbitrator is authorized to resolve any disputes concerning the exchange of information.

R-22. Date, Time, and Place of Hearing

The arbitrator shall set the date, time, and place for each hearing. The parties shall respond to requests for hearing dates in a timely manner, be cooperative in scheduling the earliest practicable date, and adhere to the established hearing schedule. The AAA shall send a notice of hearing to the parties at least 10 days in advance of the hearing date, unless otherwise agreed by the parties.

R-23. Attendance at Hearings

The arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person other than a party and its representatives.

R-24. Representation

Any party may be represented by counsel or other authorized representative. A party intending to be so represented shall notify the other party and the AAA of the

name and address of the representative at least three days prior to the date set for the hearing at which that person is first to appear. When such a representative initiates an arbitration or responds for a party, notice is deemed to have been given.

R-25. Oaths

Before proceeding with the first hearing, each arbitrator may take an oath of office and, if required by law, shall do so. The arbitrator may require witnesses to testify under oath administered by any duly qualified person and, if it is required by law or requested by any party, shall do so.

R-26. Stenographic Record

Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements at least three days in advance of the hearing.

The requesting party or parties shall pay the cost of the record. If the transcript is agreed by the parties, or determined by the arbitrator to be the official record of the proceeding, it must be provided to the arbitrator and made available to the other parties for inspection, at a date, time, and place determined by the arbitrator.

R-27. Interpreters

Any party wishing an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the service.

R-28. Postponements

The arbitrator may postpone any hearing upon agreement of the parties, upon request of a party for good cause shown, or upon the arbitrator's own initiative.

R-29. Arbitration in the Absence of a Party or Representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.

R-30. Conduct of Proceedings

(a) The claimant shall present evidence to support its claim. The respondent shall then present evidence to support its defense. Witnesses for each party shall also submit to questions from the arbitrator and the adverse party. The arbitrator has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.

(b) The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.

(c) The parties may agree to waive oral hearings in any case.

R-31. Evidence

(a) The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to

an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent, in default or has waived the right to be present.

(b) The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant.

(c) The arbitrator shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.

(d) An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.

R-32. Evidence by Affidavit and Post-hearing Filing of Documents or Other Evidence

(a) The arbitrator may receive and consider the evidence of witnesses by declaration or affidavit, but shall give it only such weight as the arbitrator deems it entitled to after consideration of any objection made to its admission.

(b) If the parties agree or the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, the documents or other evidence shall be filed with the AAA for transmission to the arbitrator. All parties shall be afforded an opportunity to examine and respond to such documents or other evidence.

R-33. Inspection or Investigation

An arbitrator finding it necessary to make an inspection or investigation in connection with the arbitration shall direct the AAA to so advise the parties. The arbitrator shall set the date and time and the AAA shall notify the parties. Any party who so desires may be present at such an inspection or investigation. In the event that one or all parties are not present at the inspection or investigation, the arbitrator shall make an oral or written report to the parties and afford them an opportunity to comment.

R-34. Interim Measures **

(a) The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.

(b) Such interim measures may take the form of an interim award, and the arbitrator may require security for the costs of such measures.

(c) A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

R-35. Closing of Hearing

The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed. If briefs are to be filed, the hearing

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** The Optional Rules may be found on page 49.

shall be declared closed as of the final date set by the arbitrator for the receipt of briefs. If documents are to be filed as provided in Section R-32 and the date set for their receipt is later than that set for the receipt of briefs, the later date shall be the closing date of the hearing. The time limit within which the arbitrator is required to make the award shall commence, in the absence of other agreements by the parties, upon the closing of the hearing.

R-36. Reopening of Hearing

The hearing may be reopened on the arbitrator's initiative, or upon application of a party, at any time before the award is made. If reopening the hearing would prevent the making of the award within the specific time agreed on by the parties in the contract(s) out of which the controversy has arisen, the matter may not be reopened unless the parties agree on an extension of time. When no specific date is fixed in the contract, the arbitrator may reopen the hearing and shall have 30 days from the closing of the reopened hearing within which to make an award.

R-37. Waiver of Rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection in writing shall be deemed to have waived the right to object.

R-38. Extensions of Time

The parties may modify any period of time by mutual agreement. The AAA or the arbitrator may for good cause extend any period of time established by these rules, except the time for making the award. The AAA shall notify the parties of any extension.

R-39. Serving of Notice

(a) Any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules, for any court action in connection therewith, or for the entry of judgment on any award made under these rules may be served on a party by mail addressed to the party, or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard to the dispute is or has been granted to the party.

(b) The AAA, the arbitrator and the parties may also use overnight delivery or electronic facsimile transmission (fax), to give the notices required by these rules. Where all parties and the arbitrator agree, notices may be transmitted by electronic mail (e-mail), or other methods of communication.

(c) Unless otherwise instructed by the AAA or by the arbitrator, any documents submitted by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

R-40. Majority Decision

When the panel consists of more than one arbitrator, unless required by law or by the arbitration agreement, a majority of the arbitrators must make all decisions.

R-41. Time of Award

The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 30 days from the date of closing the hearing, or, if oral hearings have been waived, from the

date of the AAA's transmittal of the final statements and proofs to the arbitrator.

R-42. Form of Award

(a) Any award shall be in writing and signed by a majority of the arbitrators. It shall be executed in the manner required by law.

(b) The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate.

R-43. Scope of Award

(a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.

(b) In addition to a final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards. In any interim, interlocutory, or partial award, the arbitrator may assess and apportion the fees, expenses, and compensation related to such award as the arbitrator determines is appropriate.

(c) In the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-49, R-50, and R-51. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate.

(d) The award of the arbitrator(s) may include:

(i) interest at such rate and from such date as the arbitrator(s) may deem appropriate; and

(ii) an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.

R-44. Award upon Settlement

If the parties settle their dispute during the course of the arbitrationand if the parties so request, the arbitrator may set forth the terms of the settlement in a "consent award." A consent award must include an allocation of arbitration costs, including administrative fees and expenses as well as arbitrator fees and expenses.

R-45. Delivery of Award to Parties

Parties shall accept as notice and delivery of the award the placing of the award or a true copy thereof in the mail addressed to the parties or their representatives at the last known addresses, personal or electronic service of the award, or the filing of the award in any other manner that is permitted by law.

R-46. Modification of Award

Within 20 days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, to correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided. The other parties shall be given 10 days to respond to the request. The arbitrator shall dispose of the request within 20 days after transmittal by the AAA to the arbitrator of the request and any response thereto.

R-47. Release of Documents for Judicial Proceedings

The AAA shall, upon the written request of a party, furnish to the party, at the party's expense, certified copies of any papers in the AAA's possession that may be required in judicial proceedings relating to the arbitration.

R-48. Applications to Court and Exclusion of Liability

(a) No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

(b) Neither the AAA nor any arbitrator in a proceeding under these rules is a necessary or proper party in judicial proceedings relating to the arbitration.

(c) Parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.

(d) Parties to an arbitration under these rules shall be deemed to have consented that neither the AAA nor any arbitrator shall be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any arbitration under these rules.

R-49. Administrative Fees

As a not-for-profit organization, the AAA shall prescribe an initial filing fee and a case service fee to compensate it for the cost of providing administrative services. The fees in effect when the fee or charge is incurred shall be applicable. The filing fee shall be advanced by the party or parties making a claim or counterclaim, subject to final

apportionment by the arbitrator in the award. The AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees.

R-50. Expenses

The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, and any witness and the cost of any proof produced at the direct request of the arbitrator, shall be borne equally by the parties, unless they agree otherwise or unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties.

R-51. Neutral Arbitrator's Compensation

(a) Arbitrators shall be compensated at a rate consistent with the arbitrator's stated rate of compensation.

(b) If there is disagreement concerning the terms of compensation, an appropriate rate shall be established with the arbitrator by the AAA and confirmed to the parties.

(c) Any arrangement for the compensation of a neutral arbitrator shall be made through the AAA and not directly between the parties and the arbitrator.

R-52. Deposits

The AAA may require the parties to deposit in advance of any hearings such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator's fee, if any, and shall render an accounting to the parties and return any unexpended balance at the conclusion of the case.

R-53. Interpretation and Application of Rules

The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of these rules, it shall be decided by a majority vote. If that is not possible, either an arbitrator or a party may refer the question to the AAA for final decision. All other rules shall be interpreted and applied by the AAA.

R-54. Suspension for Nonpayment

If arbitrator compensation or administrative charges have not been paid in full, the AAA may so inform the parties in order that one of them may advance the required payment. If such payments are not made, the arbitrator may order the suspension or termination of the proceedings. If no arbitrator has yet been appointed, the AAA may suspend the proceedings.

Expedited Procedures

E-1. Limitation on Extensions

Except in extraordinary circumstances, the AAA or the arbitrator may grant a party no more than one seven-day extension of time to respond to the demand for arbitration or counterclaim as provided in Section R-4.

E-2. Changes of Claim or Counterclaim

A claim or counterclaim may be increased in amount, or a new or different claim or counterclaim added, upon the agreement of the other party, or the consent of the arbitrator. After the arbitrator is appointed, however, no new or different claim or counterclaim may be submitted except with the arbitrator's consent. If an increased claim or counterclaim exceeds $75,000, the case will be administered under the regular procedures unless all parties and the arbitrator agree that the case may continue to be processed under the Expedited Procedures.

E-3. Serving of Notices

In addition to notice provided by Section R-39(b), the parties shall also accept notice by telephone. Telephonic notices by the AAA shall subsequently be confirmed in writing to the parties. Should there be a failure to confirm in writing any such oral notice, the proceeding shall nevertheless be valid if notice has, in fact, been given by telephone.

E-4. Appointment and Qualifications of Arbitrator

(a) The AAA shall simultaneously submit to each party an identical list of five proposed arbitrators drawn from its National Roster from which one arbitrator shall be appointed.

(b) The parties are encouraged to agree to an arbitrator from this list and to advise the AAA of their agreement. If the parties are unable to agree upon an arbitrator, each party may strike two names from the list and return it to the AAA within seven days from the date of the AAA's mailing to the parties. If for any reason the appointment of an arbitrator cannot be made from the list, the AAA may make the appointment from other members of the panel without the submission of additional lists.

(c) The parties will be given notice by the AAA of the appointment of the arbitrator, who shall be subject to disqualification for the reasons specified in Section R-17. The parties shall notify the AAA within seven days of any objection to the arbitrator appointed. Any such objection shall be for cause and shall be confirmed in writing to the AAA with a copy to the other party or parties.

E-5. Exchange of Exhibits

At least two business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing. The arbitrator shall resolve disputes concerning the exchange of exhibits.

E-6. Proceedings on Documents

Where no party's claim exceeds $10,000, exclusive of interest and arbitration costs, and other cases in which the parties agree, the dispute shall be resolved by submission of documents, unless any party requests an oral hearing, or the arbitrator determines that an oral hearing is necessary. The arbitrator shall establish a fair and equitable procedure for the submission of documents.

E-7. Date, Time, and Place of Hearing

In cases in which a hearing is to be held, the arbitrator shall set the date, time, and place of the hearing, to be scheduled to take place within 30 days of confirmation of the arbitrator's appointment. The AAA will notify the parties in advance of the hearing date.

E-8. The Hearing

(a) Generally, the hearing shall not exceed one day. Each party shall have equal opportunity to submit its proofs and complete its case. The arbitrator shall determine the order of the hearing, and may require further submission of documents within two days after the hearing. For good cause shown, the arbitrator may schedule additional hearings within seven business days after the initial day of hearings.

(b) Generally, there will be no stenographic record. Any party desiring a stenographic record may arrange for one pursuant to the provisions of Section R-26.

E-9. Time of Award

Unless otherwise agreed by the parties, the award shall be rendered not later than 14 days from the date of the closing of the hearing or, if oral hearings have been waived, from the date of the AAA's transmittal of the final statements and proofs to the arbitrator.

E-10. Arbitrator's Compensation

Arbitrators will receive compensation at a rate to be suggested by the AAA regional office.

Procedures for Large, Complex Commercial Disputes

L-1. Administrative Conference

Prior to the dissemination of a list of potential arbitrators, the AAA shall, unless the parties agree otherwise, conduct an administrative conference with the parties and/or their attorneys or other representatives by conference call. The conference will take place within 14 days after the commencement of the arbitration. In the event the parties are unable to agree on a mutually acceptable time for the conference, the AAA may contact the parties individually to discuss the issues contemplated herein. Such administrative conference shall be conducted for the following purposes and for such additional purposes as the parties or the AAA may deem appropriate:

(a) to obtain additional information about the nature and magnitude of the dispute and the anticipated length of hearing and scheduling;

(b) to discuss the views of the parties about the technical and other qualifications of the arbitrators;

(c) to obtain conflicts statements from the parties; and

(d) to consider, with the parties, whether mediation or other nonadjudicative methods of dispute resolution might be appropriate.

L-2. Arbitrators

(a) Large, complex commercial cases shall be heard and determined by either one or three arbitrators, as may be agreed upon by the parties. If the parties are unable to agree upon the number of arbitrators and a claim or counterclaim involves at least $1,000,000, then three arbitrator(s) shall hear and determine the case. If the parties are unable to agree on the number of arbitrators and each

claim and counterclaim is less than $1,000,000, then one arbitrator shall hear and determine the case.

(b) The AAA shall appoint arbitrator(s) as agreed by the parties. If they are unable to agree on a method of appointment, the AAA shall appoint arbitrators from the Large, Complex Commercial Case Panel, in the manner provided in the regular Commercial Arbitration Rules. Absent agreement of the parties, the arbitrator(s) shall not have served as the mediator in the mediation phase of the instant proceeding.

L-3. Preliminary Hearing

As promptly as practicable after the selection of the arbitrator(s), a preliminary hearing shall be held among the parties and/or their attorneys or other representatives and the arbitrator(s). Unless the parties agree otherwise, the preliminary hearing will be conducted by telephone conference call rather than in person. At the preliminary hearing the matters to be considered shall include, without limitation:

(a) service of a detailed statement of claims, damages and defenses, a statement of the issues asserted by each party and positions with respect thereto, and any legal authorities the parties may wish to bring to the attention of the arbitrator(s);

(b) stipulations to uncontested facts;

(c) the extent to which discovery shall be conducted;

(d) exchange and premarking of those documents which each party believes may be offered at the hearing;

(e) the identification and availability of witnesses, including experts, and such matters with respect to

witnesses including their biographies and expected testimony as may be appropriate;

(f) whether, and the extent to which, any sworn statements and/or depositions may be introduced;

(g) the extent to which hearings will proceed on consecutive days;

(h) whether a stenographic or other official record of the proceedings shall be maintained;

(i) the possibility of utilizing mediation or other non-adjudicative methods of dispute resolution; and

(j) the procedure for the issuance of subpoenas.

By agreement of the parties and/or order of the arbitrator(s), the pre-hearing activities and the hearing procedures that will govern the arbitration will be memorialized in a Scheduling and Procedure Order.

L-4. Management of Proceedings

(a) Arbitrator(s) shall take such steps as they may deem necessary or desirable to avoid delay and to achieve a just, speedy and cost-effective resolution of large, complex commercial cases.

(b) Parties shall cooperate in the exchange of documents, exhibits and information within such party's control if the arbitrator(s) consider such production to be consistent with the goal of achieving a just, speedy and cost-effective resolution of a large, complex commercial case.

(c) The parties may conduct such discovery as may be agreed to by all the parties provided, however, that the arbitrator(s) may place such limitations on the conduct of such discovery as the arbitrator(s) shall deem appropriate. If the parties cannot agree on

production of documents and other information, the arbitrator(s), consistent with the expedited nature of arbitration, may establish the extent of the discovery.

(d) At the discretion of the arbitrator(s), upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator(s) may order depositions of, or the propounding of interrogatories to, such persons who may possess information determined by the arbitrator(s) to be necessary to determination of the matter.

(e) The parties shall exchange copies of all exhibits they intend to submit at the hearing 10 business days prior to the hearing unless the arbitrator(s) determine otherwise.

(f) The exchange of information pursuant to this rule, as agreed by the parties and/or directed by the arbitrator(s), shall be included within the Scheduling and Procedure Order.

(g) The arbitrator is authorized to resolve any disputes concerning the exchange of information.

(h) Generally hearings will be scheduled on consecutive days or in blocks of consecutive days in order to maximize efficiency and minimize costs.

Optional Rules for Emergency Measures of Protection

O-1. Applicability

Where parties by special agreement or in their arbitration clause have adopted these rules for emergency measures of protection, a party in need of emergency relief prior to the constitution of the panel shall notify the AAA and all other parties in writing of the nature of the relief sought and the reasons why such relief is required on an emergency basis. The application shall also set forth the reasons why the party is entitled to such relief. Such notice may be given by facsimile transmission, or other reliable means, but must include a statement certifying that all other parties have been notified or an explanation of the steps taken in good faith to notify other parties.

O-2. Appointment of Emergency Arbitrator

Within one business day of receipt of notice as provided in Section O-1, the AAA shall appoint a single emergency arbitrator from a special AAA panel of emergency arbitrators designated to rule on emergency applications. The emergency arbitrator shall immediately disclose any circumstance likely, on the basis of the facts disclosed in the application, to affect such arbitrator's impartiality or independence. Any challenge to the appointment of the emergency arbitrator must be made within one business day of the communication by the AAA to the parties of the appointment of the emergency arbitrator and the circumstances disclosed.

O-3. Schedule

The emergency arbitrator shall as soon as possible, but in any event within two business days of appointment, establish a schedule for consideration of the application

for emergency relief. Such schedule shall provide a reasonable opportunity to all parties to be heard, but may provide for proceeding by telephone conference or on written submissions as alternatives to a formal hearing.

O-4. Interim Award

If after consideration, the emergency arbitrator is satisfied that the party seeking the emergency relief has shown that immediate and irreparable loss or damage will result in the absence of emergency relief, and that such party is entitled to such relief, the emergency arbitrator may enter an interim award granting the relief and stating the reasons therefore.

O-5. Constitution of the Panel

Any application to modify an interim award of emergency relief must be based on changed circumstances and may be made to the emergency arbitrator until the panel is constituted; thereafter such a request shall be addressed to the panel. The emergency arbitrator shall have no further power to act after the panel is constituted unless the parties agree that the emergency arbitrator is named as a member of the panel.

O-6. Security

Any interim award of emergency relief may be conditioned on provision by the party seeking such relief of appropriate security.

O-7. Special Master

A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate. If the AAA is directed by a judicial authority to nominate a special master to consider and report on an application for emergency relief, the AAA shall proceed

as provided in Section O-1 of this article and the references to the emergency arbitrator shall be read to mean the special master, except that the special master shall issue a report rather than an interim award.

O-8. Costs

The costs associated with applications for emergency relief shall initially be apportioned by the emergency arbitrator or special master, subject to the power of the panel to determine finally the apportionment of such costs.

Administrative Fee Schedules
(Standard and Flexible Fee)

The AAA has two administrative fee options for parties filing claims or counterclaims, the Standard Fee Schedule and Flexible Fee Schedule. The Standard Fee Schedule has a two payment schedule, and the Flexible Fee Schedule has a three payment schedule which offers lower initial filing fees, but potentially higher total administrative fees of approximately 12% to 19% for cases that proceed to a hearing. The administrative fees of the AAA are based on the amount of the claim or counterclaim. Arbitrator compensation is not included in this schedule. Unless the parties agree otherwise, arbitrator compensation and administrative fees are subject to allocation by the arbitrator in the award.

In an effort to make arbitration costs reasonable for consumers, the AAA has a separate fee schedule for consumer-related disputes. Please refer to Section C-8 of the Supplementary Procedures for Consumer-Related Disputes when filing a consumer-related claim. Note that the Flexible Fee Schedule is not available on cases administered under these supplementary procedures.

The AAA applies the Supplementary Procedures for Consumer-Related Disputes to arbitration clauses in agreements between individual consumers and businesses where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiableor primarily non-negotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use. The AAA will have the discretion to apply or not to apply the Supplementary

Procedures and the parties will be able to bring any disputes concerning the application or non-application to the attention of the arbitrator. Consumers are not prohibited from seeking relief in a small claims court for disputes or claims within the scope of its jurisdiction, even in consumer arbitration cases filed by the business.

Fees for incomplete or deficient filings: Where the applicable arbitration agreement does not reference the AAA, the AAA will attempt to obtain the agreement of the other parties to the dispute to have the arbitration administered by the AAA. However, where the AAA is unable to obtain the agreement of the parties to have the AAA administer the arbitration, the AAA will administratively close the case and will not proceed with the administration of the arbitration. In these cases, the AAA will return the filing fees to the filing party, less the amount specified in the fee schedule below for deficient filings.

Parties that file demands for arbitration that are incomplete or otherwise do not meet the filing requirements contained in these Rules shall also be charged the amount specified below for deficient filings if they fail or are unable to respond to the AAA's request to correct the deficiency.

Fees for additional services: The AAA reserves the right to assess additional administrative fees for services performed by the AAA beyond those provided for in these Rules which may be required by the parties' agreement or stipulation.

Standard Fee Schedule

An Initial Filing Fee is payable in full by a filing party when a claim, counterclaim, or additional claim is filed. A Final Fee will be incurred for all cases that proceed to their first hearing. This fee will be payable in advance at

the time that the first hearing is scheduled. This fee will be refunded at the conclusion of the case if no hearings have occurred. However, if the Association is not notified at least 24 hours before the time of the scheduled hearing, the Final Fee will remain due and will not be refunded.

These fees will be billed in accordance with the following schedule:

Amount of Claim	Initial Filing Fee	Final Fee
Above $0 to $10,000	$775	$200
Above $10,000 to $75,000	$975	$300
Above $75,000 to $150,000	$1,850	$750
Above $150,000 to $300,000	$2,800	$1,250
Above $300,000 to 500,000	$4,350	$1,750
Above $500,000 to $1,000,000	$6,200	$2,500
Above $1,000,000 to $5,000,000	$8,200	$3,250
Above $5,000,000 to $10,000,000	$10,200	$4,000
Above $10,000,000	Base fee of $12,800 plus .01% of the amount above $10,000,000 Fee Capped at $65,000	$6,000
Nonmonetary Claims[1]	$3,350	$1,250
Deficient Claim Filing Fee[2]	$350	
Additional Services[3]		

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[1] *This fee is applicable when a claim or counterclaim is not for a monetary amount. Where a monetary claim amount is not known, parties will be required to state a range of claims or be subject to a filing fee of $10,200.*

[2] *The Deficient Claim Filing Fee shall not be charged in cases filed by a consumer in an arbitration governed by the Supplementary Procedures for the Resolution of Consumer-Related Disputes, or in cases filed by an Employee who is submitting their dispute to arbitration pursuant to an employer promulgated plan.*

[3] *The AAA may assess additional fees where procedures or services outside the Rules sections are required under the parties' agreement or by stipulation.*

Fees are subject to increase if the amount of a claim or counterclaim is modified after the initial filing date. Fees are subject to decrease if the amount of a claim or counterclaim is modified before the first hearing.

The minimum fees for any case having three or more arbitrators are $2,800 for the Initial Filing Fee, plus a $1,250 Final Fee. Expedited Procedures are applied in any case where no disclosed claim or counterclaim exceeds $75,000, exclusive of interest and arbitration costs.

Parties on cases filed under either the Flexible Fee Schedule or the Standard Fee Schedule that are held in abeyance for one year will be assessed an annual abeyance fee of $300. If a party refuses to pay the assessed fee, the other party or parties may pay the entire fee on behalf of all parties, otherwise the matter will be administratively closed.

For more information, please contact your local AAA office, case management center, or our Customer Service desk at 1-800-778-7879.

Refund Schedule for Standard Fee Schedule

The AAA offers a refund schedule on filing fees connected with the Standard Fee Schedule. For cases with claims up to $75,000, a minimum filing fee of $350 will not be refunded. For all other cases, a minimum fee of $600 will not be refunded. Subject to the minimum fee requirements, refunds will be calculated as follows:

> 100% of the filing fee, above the minimum fee, will be refunded if the case is settled or withdrawn within five calendar days of filing.

> 50% of the filing fee, will be refunded if the case is settled or withdrawn between six and 30 calendar days of filing.

> 25% of the filing fee will be refunded if the case is settled or withdrawn between 31 and 60 calendar days of filing.

No refund will be made once an arbitrator has been appointed (this includes one arbitrator on a three-arbitrator panel). No refunds will be granted on awarded cases.

Note: The date of receipt of the demand for arbitration with the AAA will be used to calculate refunds of filing fees for both claims and counterclaims.

Flexible Fee Schedule

A non-refundable Initial Filing Fee is payable in full by a filing party when a claim, counterclaim, or additional claim is filed. Upon receipt of the Demand for Arbitration, the AAA will promptly initiate the case and notify all parties as well as establish the due date for filing of an Answer, which may include a Counterclaim. In order to proceed with the further administration of the arbitration and appointment of the arbitrator(s), the appropriate, non-refundable Proceed Fee outlined below must be paid.

If a Proceed Fee is not submitted within ninety (90) days of the filing of the Claimant's Demand for Arbitration, the Association will administratively close the file and notify all parties.

No refunds or refund schedule will apply to the Filing or Proceed Fees once received.

The Flexible Fee Schedule below also may be utilized for the filing of counterclaims. However, as with the Claimant's claim, the counterclaim will not be presented to the arbitrator until the Proceed Fee is paid.

A Final Fee will be incurred for all claims and/or counterclaims that proceed to their first hearing. This fee will be payable in advance when the first hearing is scheduled, but will be refunded at the conclusion of the case if no hearings have occurred. However, if the Association is not notified of a cancellation at least 24 hours before the time of the scheduled hearing, the Final Fee will remain due and will not be refunded.

All fees will be billed in accordance with the following schedule:

Amount of Claim	Initial Filing Fee	Proceed Fee	Final Fee
Above $0 to $10,000	$400	$475	$200
Above $10,000 to $75,000	$625	$500	$300
Above $75,000 to $150,000	$850	$1250	$750
Above $150,000 to $300,000	$1,000	$2125	$1,250
Above $300,000 to $500,000	$1,500	$3,400	$1,750
Above $500,000 to $1,000,000	$2,500	$4,500	$2,500
Above $1,000,000 to $5,000,000	$2,500	$6,700	$3,250
Above $5,000,000 to $10,000,000	$3,500	$8,200	$4,000
Above $10,000,000	$4,500	$10,300 plus .01% of claim amount over $10,000,000 up to $65,000	$6,000
Nonmonetary[4]	$2,000	$2,000	$1,250
Deficient Claim Filing Fee	$350		
Additional Services[5]			

[4] *This fee is applicable when a claim or counterclaim is not for a monetary amount. Where a monetary claim amount is not known, parties will be required to state a range of claims or be subject to a filing fee of $3,500 and a proceed fee of $8,200.*

[5] *The AAA reserves the right to assess additional administrative fees for services performed bythe AAA beyond those provided for in these Rules and which may be required by the parties' agreement or stipulation.*

For more information, please contact your local AAA office, case management center, or our Customer Service desk at 1-800-778-7879. All fees are subject to increase if the amount of a claim or counterclaim is modified after the initial filing date. Fees are subject to decrease if the amount of a claim or counterclaim is modified before the first hearing.

The minimum fees for any case having three or more arbitrators are $1,000 for the Initial Filing Fee; $2,125 for the Proceed Fee; and $1,250 for the Final Fee.

Under the Flexible Fee Schedule, a party's obligation to pay the Proceed Fee shall remain in effect regardless of any agreement of the parties to stay, postpone or otherwise modify the arbitration proceedings. Parties that, through mutual agreement, have held their case in abeyance for one year will be assessed an annual abeyance fee of $300. If a party refuses to pay the assessed fee, the other party or parties may pay the entire fee on behalf of all parties, otherwise the matter will be closed.

Note: The date of receipt by the AAA of the demand for arbitration will be used to calculate the ninety (90) day time limit for payment of the Proceed Fee.

There is no Refund Schedule in the Flexible Fee Schedule.

Hearing Room Rental

The fees described above do not cover the cost of hearing rooms, which are available on a rental basis. Check with the AAA for availability and rates.

No. 17-1272

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v.

ARCHER AND WHITE SALES, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether the Federal Arbitration Act permits a court to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes the claim of arbitrability is "wholly groundless."

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Henry Schein, Inc.; Danaher Corporation; Instrumentarium Dental Inc.; Dental Equipment LLC; Kavo Dental Technologies, LLC; and Dental Imaging Technologies Corporation. Respondent is Archer and White Sales, Inc.

Henry Schein, Inc., has no parent corporation, and no publicly held company holds 10% or more of its stock.

Instrumentarium Dental Inc.; Dental Equipment LLC; Kavo Dental Technologies, LLC; and Dental Imaging Technologies Corporation are wholly owned subsidiaries of petitioner Danaher Corporation. Danaher Corporation has no parent corporation, and no publicly held company holds 10% or more of its stock.

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In the Supreme Court of the United States

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 878 F.3d 488. The district court's opinion denying petitioners' motions to compel arbitration (Pet. App. 18a-38a) is unreported. The magistrate judge's order granting petitioners' motions (Pet. App. 39a-44a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 2017. The petition for a writ of certiorari was filed on March 9, 2018, and granted on June 25, 2018. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. 2, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 3 of the Federal Arbitration Act, 9 U.S.C. 3, provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Section 4 of the Federal Arbitration Act, 9 U.S.C. 4, provides in relevant part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court * * * for an order directing that such arbitration proceed in the manner provided for in such

> agreement. * * * The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

STATEMENT

This case presents a simple question concerning the interpretation of the Federal Arbitration Act. Under the Act, "parties can agree to arbitrate gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 68-69 (2010) (internal quotation marks and citations omitted). That is because "[a]n agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the [Arbitration Act] operates on this additional arbitration agreement just as it does on any other." *Id.* at 70. The question presented here is whether the Arbitration Act contains an unstated exception to that principle, permitting a court to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court independently analyzes the merits of the movant's claim of arbitrability and concludes that the claim is "wholly groundless."

Petitioners either manufacture or distribute dental equipment; respondent is a former distributor for certain petitioners. Certain distributorship agreements required respondent to arbitrate disputes "arising under or related to" the agreements, including disputes over arbitrability. Respondent nevertheless filed a complaint in federal court, alleging that petitioners had violated federal and

state antitrust laws by wrongfully terminating or restricting respondent's distributorship rights.

Petitioners moved to stay the litigation and compel arbitration. A magistrate judge initially granted petitioners' motions. But the district court vacated the magistrate judge's order and denied the motions, and the court of appeals affirmed. The court of appeals relied on an earlier decision in which it had recognized the "wholly groundless" exception. And it concluded that the exception was applicable here, thereby arrogating unto itself the authority to decide arbitrability—an authority the parties had delegated to the arbitrator. The court of appeals' decision cannot be reconciled with the Arbitration Act's text or its overarching purpose: namely, to "ensure that private agreements to arbitrate are enforced according to their terms." *Stolt-Nielsen S.A.* v. *AnimalFeeds International Corp.*, 559 U.S. 662, 682 (2010) (internal quotation marks and citations omitted). This Court should reject the "wholly groundless" exception and vacate the court of appeals' judgment.

A. Background

As this Court is well aware, arbitration is an alternative form of dispute resolution that offers many benefits over traditional litigation. Arbitration allows the parties to design their own "efficient, streamlined procedures tailored to the type of dispute" at issue. *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 344 (2011). It produces "expeditious results." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985). And it "reduc[es] the cost" of dispute resolution. *AT&T Mobility*, 563 U.S. at 345.

Despite those benefits, there has been a long history of "judicial hostility to arbitration." *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 510-511 (1974). That hostility

dates from the English common law, which "traditionally considered irrevocable arbitration agreements as 'ousting' the courts of jurisdiction, and refused to enforce such agreements for this reason." *Id.* at 510 n.4. Because it was "firmly embedded" in English law, this judicial hostility to arbitration carried over into American law. H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2 (1924). It "manifested itself in a great variety of devices and formulas declaring arbitration against public policy." *AT&T Mobility*, 563 U.S. at 342 (internal quotation marks and citation omitted).

In 1925, Congress enacted the Arbitration Act to "reverse the longstanding judicial hostility to arbitration agreements." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). As this Court has repeatedly recognized, the Arbitration Act reflects "both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract." *AT&T Mobility*, 563 U.S. at 339 (internal quotation marks and citation omitted). Section 2 of the Arbitration Act—the Act's "primary substantive provision," *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 24 (1983)—provides that "[a] written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2.

Consistent with Section 2's express mandate and the broader policy underlying the Arbitration Act, courts must "place[] arbitration agreements on an equal footing with other contracts[] and * * * enforce them according to their terms." *Rent-A-Center*, 561 U.S. at 67 (citations omitted). The Arbitration Act's command that courts enforce arbitration agreements according to their

terms applies in disputes over "gateway" issues of arbitrability, including whether a particular claim falls within the scope of the arbitration provision. See *id.* at 69. And it applies in disputes over the antecedent question of who decides such gateway issues: the court or the arbitrator. See *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 943-944 (1995).

Accordingly, although courts presumptively resolve gateway disputes of arbitrability in the absence of a contractual provision addressing the issue, parties may supersede that default rule by "clear[ly] and unmistakab[ly]" agreeing to "arbitrate arbitrability." *First Options*, 514 U.S. at 944. Where parties include a so-called "delegation provision" in their agreement, it is treated as an "additional, antecedent agreement the party seeking arbitration asks the federal court to enforce," and the Arbitration Act "operates on this additional agreement just as it does on any other." *Rent-A-Center*, 561 U.S. at 70. And where parties delegate the authority to decide arbitrability to the arbitrator, the delegation applies to virtually all gateway disputes, including disputes over whether the arbitration agreement "covers a particular controversy." *Id.* at 68-69; see *BG Group, PLC* v. *Republic of Argentina*, 134 S. Ct. 1198, 1206 (2014).

Notably, an agreement need not contain an express delegation provision for the delegation to be "clear and unmistakable." As every court of appeals to have addressed the question has held, an agreement that incorporates rules delegating questions of arbitrability to the arbitrator, such as the rules of the American Arbitration Association (AAA), is sufficiently clear and unmistakable to render the delegation valid and enforceable. See *Belnap* v. *Iasis Healthcare*, 844 F.3d 1272, 1283-1284 (10th Cir. 2017); *Brennan* v. *Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015); *Petrofac, Inc.* v. *DynMcDermott Petroleum*

Operations Co., 687 F.3d 671, 675 (5th Cir. 2012); *Fallo* v. *High-Tech Institute*, 559 F.3d 874, 878 (8th Cir. 2009); *Awuah* v. *Coverall North America, Inc.*, 554 F.3d 7, 11 (1st Cir. 2009); *Qualcomm Inc.* v. *Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006); *Terminix International Co.* v. *Palmer Ranch LP*, 432 F.3d 1327, 1332 (11th Cir. 2005); *Contec Corp.* v. *Remote Solutions, Co.*, 398 F.3d 205, 208, 211 (2d Cir. 2005).

B. Facts And Procedural History

1. Petitioners either manufacture or distribute dental equipment; respondent distributes such equipment. During the relevant time period, respondent had agreements to serve as a distributor for some of the petitioners. J.A. 26-28.

In 2012, respondent filed suit against petitioners in the United States District Court for the Eastern District of Texas, alleging that petitioners had restrained trade in violation of the Sherman Act and state antitrust law. J.A. 23-48. The complaint sought "tens of millions of dollars" in damages stemming from petitioners' alleged agreement to boycott respondent or restrict respondent's sales territories. J.A. 24, 25. The complaint's two counts also included summary requests for unspecified injunctive relief, stating in their entirety as follows:

> Plaintiff also seeks injunctive relief. The violations set forth above are continuing and will continue unless injunctive relief is granted.

J.A. 45, 47. The complaint contained no more detailed allegations concerning the requirements for obtaining injunctive relief. In the six years since initiating this suit, respondent has not taken additional action to seek any form of injunctive relief.

2. Petitioners moved to stay the litigation and to compel the arbitration of respondent's claims. J.A. 12-13; see 9 U.S.C. 3, 4. Petitioners' motions were based on respondent's agreements with manufacturing companies operated by petitioner Dental Equipment LLC. The agreements provided in relevant part:

> This Agreement shall be governed by the laws of the State of North Carolina. Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes relating to trademarks, trade secrets or other intellectual property of [the manufacturing company]) shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association. The place of arbitration shall be Charlotte, North Carolina.

J.A. 58.

Respondent opposed petitioners' motions. As is relevant here, respondent contended that the court should decide whether its claims were arbitrable and that the boilerplate request for injunctive relief in its complaint rendered the entire dispute non-arbitrable. In response, petitioners noted that the arbitration provision incorporated AAA rules delegating questions of arbitrability to the arbitrator. Petitioners further noted that, where (as here) an arbitration provision contains a carve-out for injunctive relief, such a carve-out is routinely understood merely to permit injunctive relief from a court either on a preliminary basis to preserve the status quo *before or during* arbitration of the underlying claims, or on a permanent basis *after* the plaintiff secures an arbitral award in its favor. See, *e.g.*, *Comedy Club, Inc.* v. *Improv West Associates*, 553 F.3d 1277, 1285-1286 (9th Cir.), cert. denied, 558 U.S. 824 (2009); *Lawrence* v. *Comprehensive Business Services Co.*, 833 F.2d 1159, 1163 (5th Cir. 1987); *Erving* v.

Virginia Squires Basketball Club, 468 F.2d 1064, 1067 (2d Cir. 1972).

A magistrate judge—to whom the case had been assigned for all pretrial purposes—granted petitioners' motions. Pet. App. 39a-44a. Citing the incorporation of the AAA rules in the relevant agreements, the magistrate judge noted that the parties had validly delegated arbitrability to the arbitrator, because "those rules very clearly state that the question of the arbitrability of a dispute is referred to the arbitrator." *Id.* at 41a. The magistrate judge then explained that, while on "the most superficial level, [respondent's] lawsuit is clearly an action seeking injunctive relief," the complaint "does not seek *only* injunctive relief," and "damages * * * are the predominant relief sought." *Ibid.*

The magistrate judge accordingly determined that "there is in this case a plausible construction [of the arbitration provision] calling for arbitration." Pet. App. 41a. On that basis, the magistrate judge concluded that the question whether the agreements' carve-out for actions seeking injunctive relief applied to petitioners' claims "should properly be left for the arbitrator to decide," given the parties' delegation of arbitrability to the arbitrator. *Id.* at 42a.

3. Respondent asked the district court to reconsider the magistrate judge's order. More than three years later, the district court vacated the magistrate judge's order and denied petitioners' motions. Pet. App. 18a-38a. Explicitly interpreting the "[s]cope of [the] [a]rbitration [c]lause," *id.* at 26a, the court reasoned that the agreements' exception for "actions seeking injunctive relief" meant that respondent's inclusion of a perfunctory request for injunctive relief entitled respondent to go to court on all of its claims. *Id.* at 27a-28a. Of particular rel-

evance here, the court determined that any contrary reading of the agreements' arbitration provision would be "wholly groundless," enabling the court to determine arbitrability regardless of whether the parties had delegated that authority to the arbitrator. *Id.* at 34a-37a.

4. Petitioners filed an interlocutory appeal as of right under the Arbitration Act. See 9 U.S.C. 16(a). The court of appeals affirmed. Pet. App. 1a-17a.

Like the district court, the court of appeals held that its earlier decision in *Douglas* v. *Regions Bank*, 757 F.3d 460 (5th Cir. 2014), which had recognized the "wholly groundless" exception, supplied the governing legal rule. Pet. App. 11a.[1] In *Douglas*, as in this case, the court of appeals considered whether to compel arbitration in light of a provision in the parties' agreement delegating the authority to decide arbitrability to the arbitrator. The court of appeals acknowledged that, under this Court's precedents, "[d]elegation provisions * * * normally require an arbitrator to decide in the first instance whether a dispute falls within the scope of the arbitration provision." 757 F.3d at 462. But relying on decisions from the Federal Circuit, the court of appeals recognized an exception to that rule where "the argument that the claim at hand is within the scope of the arbitration agreement is 'wholly groundless.'" *Id.* at 463-464 & n.4 (citing *Qualcomm*, 466

[1] Curiously, the court of appeals did not definitively decide whether the parties had "clearly and unmistakably" delegated the authority to decide arbitrability to the arbitrator, even though it (like all of the other courts of appeals to have considered the issue) had previously held that an agreement that incorporates rules delegating questions of arbitrability to the arbitrator constitutes a clear and unmistakable delegation. Pet. App. 6a-11a; see *Petrofac*, 687 F.3d at 675. The court reasoned that it "need not decide [that question] because *Douglas* provides us with another avenue to resolve this [case]: the 'wholly groundless' inquiry." Pet. App. 11a.

F.3d at 1371, and *InterDigital Communications, LLC* v. *International Trade Commission*, 718 F.3d 1336, 1346-1347 (Fed. Cir. 2013), vacated on other grounds, 134 S. Ct. 1876 (2014)). The court of appeals adopted the "wholly groundless" exception over a dissent from Judge Dennis, who contended that the exception "appear[ed] to be contrary to Supreme Court authority" and explained that "questions regarding the scope of the parties' agreement to arbitrate must be addressed in the first instance by the arbitrator." *Id.* at 464, 467.

In this case, petitioners argued that applying the "wholly groundless" exception "would allow the court to construe the bounds of [the] arbitration clause before an arbitrator can do so—effectively obviating the entire purpose of delegating the gateway question to the arbitrator in the first place." Pet. App. 14a. But the court rejected that argument, concluding that, "if the ['wholly groundless'] doctrine is to have any teeth, it must apply where, as here, an arbitration clause expressly excludes certain types of disputes." *Id.* at 15a-16a.

The court of appeals proceeded to determine, based on its own interpretation of the "four corners of the contract," that there was "no plausible argument that the arbitration clause applies here to an 'action seeking injunctive relief.'" Pet. App. 16a. The court of appeals reached that conclusion despite the magistrate judge's contrary determination that "there is in this case a plausible construction [of the arbitration provision] calling for arbitration," *id.* at 41a, and despite the case law limiting carve-

outs in arbitration provisions for injunctive relief to requests for pre-arbitration or post-arbitration injunctions, see pp. 8-9, *supra*.[2]

5. Petitioners sought a stay of further proceedings in the district court while their appeal was pending. J.A. 21. The district court denied petitioners' stay motion, J.A. 21-22, and the court of appeals (after carrying the stay motion with the merits) did the same, Pet. App. 45a. After the court of appeals' decision on the merits, petitioners filed an application with this Court seeking a stay of further proceedings pending disposition of their petition for a writ of certiorari. See Appl. No. 17-859. The Court granted petitioners' application without recorded dissent, and it subsequently granted the petition.

SUMMARY OF ARGUMENT

Arbitration is fundamentally a matter of contract, and the parties here contracted to give the arbitrator the authority to decide whether the underlying claims are arbitrable. Yet the court of appeals refused to enforce the delegation provision in the relevant agreements on the ground that petitioners' claim of arbitrability was "wholly groundless." The "wholly groundless" exception is foreclosed by this Court's precedents construing the Arbitration Act, and it has no footing in the Act's text or purposes. This Court should reject the court of appeals' adoption of the "wholly groundless" exception and vacate the judgment below.

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[2] Because the court of appeals held that the arbitration clause was inapplicable under the "wholly groundless" exception, it did not reach the question whether "the third parties to the arbitration clause in this case can enforce such an arbitration clause." Pet. App. 17a. The district court did not reach that question either, *id.* at 37a-38a, but the magistrate judge decided it in petitioners' favor, *id.* at 42a-44a.

A. The Arbitration Act embodies a liberal federal policy in favor of arbitration and requires courts rigorously to enforce arbitration agreements according to their terms. As this Court has already explained, that principle applies where the parties agree to have the arbitrator decide the threshold question of arbitrability: that is, whether the parties' arbitration agreement covers the claims at issue. And it applies equally to the threshold question of who should decide arbitrability, the court or the arbitrator. Where the parties clearly agree to delegate gateway issues of arbitrability to the arbitrator—including the authority to *decide* arbitrability—the Arbitration Act requires a court, as a simple matter of contract enforcement, to respect that agreement.

B. A corollary to the foregoing principle is that, when an issue is properly submitted to an arbitrator, a court may not arrogate unto itself the power to decide the issue. This Court has held that, where parties contract to remit their claims to the arbitrator, a court may not preclude arbitration simply because it believes the claims of the party seeking arbitration are plainly meritless. So too, where the issue to be arbitrated is a gateway issue of arbitrability, a court may not wade into the merits of whether a dispute is arbitrable, but must instead remit that issue to the arbitrator—even if it believes that the claim of arbitrability is "wholly groundless."

C. Neither the text of the Arbitration Act nor the policies behind it justify the recognition of a "wholly groundless" exception to the enforcement of an agreement delegating arbitrability to an arbitrator.

1. First and foremost, the "wholly groundless" exception has no basis in the text of the Arbitration Act. All of the potential textual hooks for the exception lack merit. The requirement in Sections 3 and 4 of the Arbitration Act

that a court be "satisfied" before staying litigation or compelling arbitration merely contemplates that a court will assure itself that a valid arbitration agreement exists; it does not authorize judicial intrusion into the merits of issues assigned to the arbitrator. Nor does Section 4's reference to "aggrieved" parties support the "wholly groundless" exception. A party who seeks to arbitrate the issue of arbitrability is necessarily "aggrieved" as soon as a counterparty refuses to arbitrate according to the terms of the parties' arbitration agreement, regardless of the merits of the issue to be arbitrated.

The "wholly groundless" exception is also inconsistent with the saving clause in Section 2 of the Arbitration Act, which provides that agreements to arbitrate—including agreements to arbitrate arbitrability—can be invalidated only under generally applicable contract defenses such as fraud, duress, and unconscionability. Where, as here, the parties have clearly and unmistakably delegated the authority to decide arbitrability to the arbitrator, Section 2 mandates that a court must enforce the delegation according to its terms.

2. Beyond its lack of textual grounding, the "wholly groundless" exception betrays the federal policy in favor of arbitration and disregards the contracting parties' intent. When parties agree to arbitrate disputes between them, they are agreeing to have an arbitrator, rather than a court, assess the merits of their respective positions. The Arbitration Act directs a court to respect that decision. Yet the "wholly groundless" exception would allow a court to address the merits of the claim of arbitrability despite the parties' selection of the arbitrator for that task.

What is more, the "wholly groundless" exception presents significant practical problems. Parties choose arbitration over litigation with the expectation that disputes

will be resolved quickly and efficiently. As the years-long dispute in this case demonstrates, however, the "wholly groundless" exception is anything but efficient; it creates an irresistible incentive for any party with a colorable argument against arbitration to ignore the parties' agreement to arbitrate arbitrability and challenge it in court instead. That can tie up the parties in litigation on the threshold question of who should decide arbitrability. And the vagueness of the "wholly groundless" exception provides additional cause for concern, because a court will be able to refuse to compel arbitration whenever it disagrees with the claim of arbitrability, regardless of whether the claim is truly "wholly groundless" or not—as appears to have occurred here.

Even where a claim of arbitrability is frivolous or otherwise plainly meritless, an arbitrator has the tools to deal with the situation efficiently and expeditiously (and even to impose sanctions, if necessary). The "wholly groundless" exception rests on the assumption that arbitrators will be unable faithfully to discharge their assigned responsibility to decide arbitrability. Yet that is simply another manifestation of the judicial hostility to arbitration that led Congress to enact the Arbitration Act nearly a century ago.

In short, there is no basis in law or logic for imposing on the Arbitration Act a judge-made exception where a court believes a claim of arbitrability is "wholly groundless." The court of appeals' adoption of that exception was indisputably erroneous, and its judgment should be vacated.

ARGUMENT

UNDER THE FEDERAL ARBITRATION ACT, A COURT MUST ENFORCE AN AGREEMENT DELEGATING THE AUTHORITY TO DECIDE ARBITRABILITY TO AN ARBITRATOR, REGARDLESS OF THE MERITS OF THE CLAIM OF ARBITRABILITY

A. The Arbitration Act Mandates Enforcement Of An Agreement Delegating The Authority To Decide Arbitrability To An Arbitrator

1. The Federal Arbitration Act reflects "both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011) (internal quotation marks and citation omitted). The Act's primary substantive provision, Section 2, guarantees that "[a] written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. By its plain terms, that provision requires courts to place arbitration agreements "on an equal footing with other contracts." *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 67 (2010).

The next two sections of the Arbitration Act—Sections 3 and 4—"specifically direct[] [courts] to respect and enforce the parties' chosen arbitration procedures." *Epic Systems Corp.* v. *Lewis*, 138 S. Ct. 1612, 1621 (2018). Under Section 3, a party may seek a mandatory stay of litigation pending the arbitration of any issue subject to an arbitration agreement. See 9 U.S.C. 3. And under Section 4, a party may seek a mandatory order compelling arbitration in accordance with an arbitration agreement. See

9 U.S.C. 4. Together with Section 2, those provisions require courts "rigorously [to] enforce arbitration agreements according to their terms." *American Express Co.* v. *Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013) (internal quotation marks and citation omitted).

2. When a party moves for a stay under Section 3 or an order compelling arbitration under Section 4, a "gateway" question of contract interpretation arises: does the parties' arbitration agreement cover the claims at issue? *Rent-A-Center*, 561 U.S. at 67-68. That question of arbitrability raises a second, antecedent gateway question: who should decide arbitrability, the court or the arbitrator? This Court's decisions interpreting the Arbitration Act are clear: if the parties clearly agree to arbitrate such "gateway" issues relating to arbitrability, courts must "respect and enforce" that agreement. *Epic Systems*, 138 S. Ct. at 1621.

a. This Court initially addressed the question of who should decide arbitrability—the court or the arbitrator—in the context of labor arbitration, which is governed not by the Arbitration Act but by federal common law. See *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 456 (1957). In that context, the Court concluded that "the question of arbitrability is for the courts to decide." *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583 n.7 (1960). At the same time, however, the Court stated that parties could agree to delegate the authority to decide arbitrability to an arbitrator, *ibid.*, by "clearly and unmistakably" expressing that desire in the arbitration agreement, *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U.S. 643, 649 (1986).

b. In the context of arbitrations governed by the Arbitration Act, the Court first addressed the question of who should decide arbitrability in *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938 (1995). There, the

question presented concerned the appropriate standard of review a court should apply in reviewing an arbitrator's decision on arbitrability. The answer to that question, the Court explained, turned on the underlying question of who "ha[d] the primary authority to decide whether a party ha[d] agreed to arbitrate." *Id.* at 942. And determining the "answer to the 'who' question," according to the Court, was "fairly simple." *Id.* at 943.

"Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute," the Court explained, "so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter." 514 U.S. at 943 (citations omitted). Thus, if the "parties agree[d] to submit the arbitrability question itself to arbitration," the arbitrator would have primary authority to decide that question, and a court would review the arbitrator's decision on arbitrability under the same deferential standard applied to the review of all other arbitral decisions. *Ibid.* By contrast, if the "parties did *not* agree to submit the arbitrability question itself to arbitration," the court would have primary authority to decide that question, and it would do so "independently." *Ibid.*

The Court added that "ordinary state-law principles" of contract interpretation would govern the question of whether the parties had agreed to delegate the authority to decide arbitrability to the arbitrator, with an "important" qualification. 514 U.S. at 944. As in the context of labor arbitration, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *Ibid.* (alterations, internal quotation marks, and citations omitted). The Court adopted that "interpretive rule," *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002), to ensure that the parties specifically intended to have an

arbitrator decide whether a particular dispute is arbitrable. See *First Options*, 514 U.S. at 945.

This Court further elaborated on who should decide gateway issues of arbitrability in *Rent-A-Center, supra*. That case involved claims of employment discrimination by one of the petitioner's former employees. See 561 U.S. at 65. The employee had signed an arbitration agreement covering all disputes arising out of the employment relationship. See *id.* at 65-66. Of particular relevance here, the agreement also provided that the arbitrator "shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of th[e] [a]greement[,] including[] but not limited to any claim that all or any part of th[e] [a]greement is void or voidable." *Id.* at 66.

Despite the arbitration provision, the employee filed suit in federal district court, arguing that the arbitration agreement was unconscionable. See 561 U.S. at 66. The district court granted the employer's motion to compel arbitration, but the court of appeals held that the district court should have considered the employee's unconscionability argument in the first instance. See *id.* at 66-67.

This Court reversed. The Court began by reiterating that "parties can agree to arbitrate gateway questions of arbitrability"—a rule that "merely reflects the principle that arbitration is a matter of contract." 561 U.S. at 68-69 (internal quotation marks and citation omitted). "An agreement to arbitrate a gateway issue," the Court explained, "is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce." *Id.* at 70. And the Arbitration Act "operates on this additional arbitration agreement just as it does on any other." *Ibid.* The Court ultimately held that, under the parties' delegation clause (which gave the arbitrator "exclusive authority to resolve any dispute relating to the

* * * enforceability * * * of th[e] [a]greement"), the arbitrator, and not the court, should address the employee's unconscionability argument in the first instance. *Id.* at 68, 72.

In short, when the parties clearly agree to delegate gateway issues of arbitrability to the arbitrator—including the authority to *decide* arbitrability—the Arbitration Act requires a court to "respect and enforce" that agreement. *Epic Systems*, 138 S. Ct. at 1621.

B. The Arbitration Act Does Not Permit A Court To Decide For Itself An Issue That Is Properly Submitted To An Arbitrator

A corollary to the foregoing principle is that, when an issue is properly submitted to an arbitrator, a court may not arrogate unto itself the power to decide the issue. Instead, the court merely has the authority to remit the issue to the arbitrator.

In *AT&T Technologies*, *supra*, the Court considered whether the requirement to compel arbitration under a valid arbitration agreement applies regardless of whether the claims of the party seeking arbitration are "'arguable' or not, indeed even if it appears to the court to be frivolous." 475 U.S. at 649-650. The Court concluded that, when "deciding whether the parties have agreed to submit a particular grievance to arbitration," a court "is not to rule on the potential merits of the underlying claims." *Id.* at 649. A court "ha[s] no business weighing the merits of the grievance," the Court explained, because "[t]he agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious." *Id.* at 650.

The rationale for that principle is a straightforward one: the merits of a claim subject to arbitration have no bearing on the enforceability of the arbitration agreement, because the arbitrator derives his power from the

fact the agreement exists. See *AT&T Technologies*, 475 U.S. at 648-649. After all, "[n]o obligation to arbitrate a * * * dispute arises solely by operation of law." *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 374 (1974). Rather, parties agree to arbitrate disputes as a matter of contract. And when they do, the parties vest the arbitrator—not the courts—with the authority to decide the merits. When parties contract to remit their claims to the arbitrator, the parties' intent is effectuated by remitting *all* claims to the arbitrator, without regard to their ultimate validity.

That principle applies with equal force when the issue to be arbitrated does not concern the merits of the underlying claims but is instead a gateway issue of arbitrability. When parties agree to delegate the authority to decide arbitrability to the arbitrator, they necessarily empower the arbitrator to decide whether a particular dispute falls within the range of disputes that the parties agreed to arbitrate. Put another way, the parties can be conceived to have entered into a freestanding, antecedent agreement providing that, if any dispute arose between them, the arbitrator would decide whether the dispute must be resolved by arbitration under the parties' subsequent "substantive" agreement. See *Rent-A-Center*, 561 U.S. at 70.

The Arbitration Act thus establishes a precise and logical order of operations. First, a court must look for a clear and unmistakable delegation of arbitrability to the arbitrator. If it finds one, the court must send the dispute to arbitration so that the arbitrator, consistent with the parties' intent in their antecedent agreement, can decide whether all or some of the dispute is arbitrable. Second, if—and only if—the court concludes that the parties did not delegate arbitrability, the court must itself decide whether the underlying claims are arbitrable under the parties' "substantive" arbitration agreement. Even then,

however, this Court has made clear that the merits of the claims do not factor into the analysis. See *AT&T Technologies*, 475 U.S. at 649-650. Only when the parties' agreement does not delegate arbitrability to the arbitrator *and* when a court decides that the underlying claims fall outside the range of issues the parties agreed to arbitrate can a court proceed to consider (and decide) the merits of those claims.

This Court's decisions thus foreclose the proposition that a court can decide arbitrability when the parties delegate authority to decide arbitrability to the arbitrator if the court concludes that the claim of arbitrability is "wholly groundless." As we will now explain, all of the arguments in support of recognizing a "wholly groundless" exception to the enforcement of a delegation provision lack merit.

C. There Is No Valid Basis For A 'Wholly Groundless' Exception To The Enforcement Of An Agreement Delegating The Authority To Decide Arbitrability To An Arbitrator

By incorporating the rules of the American Arbitration Association, the relevant arbitration agreements here clearly and unmistakably delegated the authority to decide arbitrability to the arbitrator, as the courts of appeals have unanimously held. See pp. 6-7, *supra*. In the decision under review, however, the court of appeals held that it could decide arbitrability, notwithstanding any delegation, if it concluded that the claim of arbitrability was "wholly groundless." Pet. App. 14a. The court proceeded to place petitioners' claim of arbitrability in the "wholly groundless" category, *id.* at 16a, even though the magistrate judge had previously determined that there was a

"plausible construction [of the arbitration provision] calling for arbitration," *id.* at 41a-42a.

The court of appeals' reasoning is deeply flawed. There is no valid basis for recognizing a "wholly groundless" exception to the Arbitration Act's mandate "rigorously [to] enforce arbitration agreements according to their terms." *Italian Colors*, 133 S. Ct. at 2309 (internal quotation marks and citation omitted). Such an exception would flout the Arbitration Act's text, betray the federal policy in favor of arbitration, and disregard the contracting parties' intent. The court of appeals erred by refusing to compel arbitration based on the delegation of arbitrability to the arbitrator, and its judgment should therefore be vacated.

1. The 'Wholly Groundless' Exception Has No Basis In The Text Of The Arbitration Act

As in all statutory-interpretation cases, the Court's analysis should begin with the text. See, *e.g.*, *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1721 (2017). For the reasons discussed above, this Court has already construed the Arbitration Act both to permit parties to delegate the authority to decide arbitrability to an arbitrator, and to preclude a court from deciding for itself an issue that is properly submitted to the arbitrator. The various contrary arguments that have been proffered in support of the "wholly groundless" exception are unavailing.

a. When the Federal Circuit became the first court of appeals to adopt the "wholly groundless" exception to the Arbitration Act in *Qualcomm Inc.* v. *Nokia Corp.*, 466 F.3d 1366 (2006), it attempted to ground that exception in Section 3 of the Arbitration Act. See *id.* at 1371. Section 3 provides that a court "shall * * * stay" the litigation

of "any issue referable to arbitration" under a written arbitration agreement "upon being satisfied that the issue * * * is referable to arbitration under [the] agreement." 9 U.S.C. 3. The Federal Circuit held that a court "may conclude that it is not 'satisfied' under [S]ection 3" if it "finds that the assertion of arbitrability is 'wholly groundless.'" *Qualcomm*, 466 F.3d at 1371.

Respondent offered a variation on that argument at the certiorari stage—one it had never previously raised in this case—based instead on Section 4 of the Arbitration Act. See Br. in Opp. 24-25. Section 4 authorizes a court to grant an order compelling arbitration to a party "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement" if the court is "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue." 9 U.S.C. 4. According to respondent, a "court assuredly is not 'satisfied' that [an] order compelling arbitration is appropriate" if it believes that "a movant's claim is baseless or illegitimate." Br. in Opp. 25.

Whether it is grounded in Section 3 or Section 4, that argument is incorrect—and this Court's decision in *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), illustrates why. There, the Court analyzed whether a court could consider fraud in the inducement of an entire contract—as opposed to fraud in the inducement of the arbitration provision specifically—in determining whether to grant a stay under Section 3 of the Arbitration Act. See *id.* at 396-397. The Court answered that question by looking to the text of Section 4. The Court noted that Section 4 requires a court to compel arbitration if it is "satisfied" that neither "the making of the agreement for arbitration" nor "the failure to comply" with the arbitration agreement is "in issue." *Id.* at 403 &

n.11 (quoting 9 U.S.C. 4). Reasoning that it was "inconceivable" that Congress intended the scope of Section 3 and Section 4 to differ, the Court held that a court "may consider only issues relating to the *making* and *performance* of the agreement to arbitrate" in determining whether to grant a stay under Section 3. *Id.* at 404 (emphases added).

The "wholly groundless" exception plainly has nothing to do with the "making" or "performance" of the agreement to arbitrate—the only things of which a court must be "satisfied" before compelling arbitration under Section 4 (or issuing a stay pending arbitration under Section 3). The "making" of the agreement concerns contract formation: did the parties enter a valid and binding arbitration agreement? And the "performance" of the agreement concerns the nonmoving party's compliance with the agreement: did the party "fail[] to comply" with the agreement by resisting arbitration, so as to require an order compelling arbitration (or staying further litigation) from the court? The "wholly groundless" exception relates neither to the "making" nor to the "performance" of the antecedent agreement at issue here, but rather to the merits of the issue to be arbitrated: namely, the issue of arbitrability.

To the extent the Federal Circuit's contrary argument rested on the specific language of Section 3 rather than Section 4, see *Qualcomm*, 466 F.3d at 1370-1371, it fails for an even more fundamental reason. By its terms, all that Section 3 requires is for the court to "be[] satisfied" that, under the parties' arbitration agreement, the "issue" allegedly "referable to arbitration" is in fact "referable to arbitration." 9 U.S.C. 3. The relevant "issue" here is *arbitrability*, and the relevant "agreement" is the parties' agreement to delegate *arbitrability* to the arbitrator. See

Rent-A-Center, 561 U.S. at 70 (noting that "[a]n agreement to arbitrate a gateway issue is simply an additional, antecedent agreement * * * and the [Arbitration Act] operates on this additional arbitration agreement just as it does on any other"). Where the parties have clearly and unmistakably agreed to arbitrate disputes over arbitrability, there is no question that those disputes are "referable to arbitration."

b. At the certiorari stage, respondent offered an alternative textual argument in defense of the "wholly groundless" exception. Section 4 permits only "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement" to seek an order compelling arbitration. 9 U.S.C. 4. When a party "files a claim in court that belongs in court," respondent argued, the party cannot be "aggrieved" for purposes of Section 4, because "there is no cognizable prejudice" from bypassing arbitration. Br. in Opp. 25.

That argument—again, one that respondent had never previously raised in this case—is equally invalid and indeed circular. Where the parties have assigned an issue to the arbitrator, a party seeking to arbitrate the issue is the very sort of "aggrieved" party that Section 4 contemplates. Recognizing "the fundamental principle that arbitration is a matter of contract," *AT&T Mobility*, 563 U.S. at 339, the Arbitration Act protects private parties' right to proceed in arbitration according to the terms of a valid arbitration agreement. It does so by "plac[ing] arbitration agreements on an equal footing with other contracts[]" and providing mechanisms for parties to "enforce them according to their terms." *Rent-A-Center*, 561 U.S. at 67. It is thus clear that a party is "aggrieved" for purposes of Section 4 as soon as a counterparty refuses to arbitrate according to the terms of the parties' valid arbitration agreement. See, *e.g.*, *Community State Bank* v.

Strong, 651 F.3d 1241, 1256 (11th Cir. 2011), cert. denied, 568 U.S. 813 (2012); *PaineWebber Inc.* v. *Faragalli*, 61 F.3d 1063, 1067 (3d Cir. 1995).

The foregoing argument applies with equal force to arbitrability disputes. In that context, it is the failure to comply with the "antecedent agreement" to delegate arbitrability to the arbitrator, *Rent-A-Center*, 561 U.S. at 70, that leaves a party "aggrieved" and permits it to seek an order compelling arbitration under Section 4. The ultimate merits of the party's claim of arbitrability are irrelevant to whether the party is "aggrieved."

Basing the "wholly groundless" exception on the word "aggrieved" in Section 4 not only is violently atextual, but would potentially lead to an absurd result. Unlike Section 4, Section 3 does not require a party seeking a stay pending arbitration to be "aggrieved": it merely requires that the party be a "party." See 9 U.S.C. 3. As a result, under respondent's reading of the Arbitration Act, a party could obtain a stay pending arbitration even if the claim of arbitrability were "wholly groundless," but it could not obtain an order compelling arbitration of that claim. Thus, even assuming respondent were correct that the "wholly groundless" exception is an intended feature of the Arbitration Act, adopting respondent's purported textual justification for the exception would "make it trivially easy * * * to undermine the Act," *Kindred Nursing Centers Limited Partnership* v. *Clark*, 137 S. Ct. 1421, 1428 (2017), because a party could avoid the "wholly groundless" exception through the simple expedient of seeking a stay (unless the Court were to read a similar limitation into Section 3). That is all the more reason to reject respondent's outlandish interpretation of Section 4.

c. Nor could Section 2 of the Arbitration Act—which governs the enforceability of arbitration agreements, including agreements to arbitrate arbitrability—provide a grounding for the "wholly groundless" exception.

Section 2 provides that "[a] written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. Section 2 thus ensures that "agreements to arbitrate are enforced according to their terms," *Stolt-Nielsen S.A.* v. *AnimalFeeds International Corp.*, 559 U.S. 662, 682 (2010) (internal quotation marks and citations omitted), subject only to the exception in the saving clause. That exception permits invalidation of arbitration agreements only under "generally applicable contract defenses, such as fraud, duress, or unconscionability." *AT&T Mobility*, 563 U.S. at 339. The saving clause "offers no refuge for defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Epic Systems*, 138 S. Ct. at 1622 (internal quotation marks and citation omitted).

The "wholly groundless" exception cannot trigger the saving clause because it is not a "ground[] * * * for the revocation of *any* contract," 9 U.S.C. 2 (emphasis added); instead, it is a doctrine that "appl[ies] only to arbitration." *Epic Systems*, 138 S. Ct. at 1622. Again, "[a]n agreement to arbitrate [the issue of arbitrability] is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce." *Rent-A-Center*, 561 U.S. at 70. The delegation of arbitrability to an arbitrator, in other words, is itself an arbitration agreement "enforceable" under the Arbitration Act. See 9 U.S.C. 2. The only function of the "wholly groundless" exception,

however, is to allow a court to refuse to enforce such an "antecedent" arbitration agreement based on the court's view of the merits of the dispute to be arbitrated: *i.e.*, whether the underlying claims fall within the range of issues the parties agreed to arbitrate.

At bottom, the "wholly groundless" exception is no different from other rules that "selectively refus[e] to enforce" arbitration agreements on grounds that do not apply to other contracts—rules this Court has consistently rejected. *Kindred Nursing*, 137 S. Ct. at 1426, 1428; see, *e.g.*, *Doctor's Associates, Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996); *Perry* v. *Thomas*, 482 U.S. 483, 491 (1987). The Court should likewise reject the "wholly groundless" exception here. Because there is no textual basis for that exception, the court of appeals erred in adopting it.

2. The 'Wholly Groundless' Exception Betrays The Federal Policy In Favor Of Arbitration And Disregards The Contracting Parties' Intent

As we have explained, the Arbitration Act reflects "both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract." *AT&T Mobility*, 563 U.S. at 339 (internal quotation marks and citation omitted). The "wholly groundless" exception promotes neither the Arbitration Act's policy nor its principle; in fact, it affirmatively disserves them.

a. When parties agree to arbitrate disputes between them, they are agreeing to have an arbitrator, rather than a court, assess the merits of their respective positions. The Arbitration Act directs a court to respect that decision: a party that establishes the existence of a valid arbitration agreement is entitled to "an order directing that such arbitration proceed *in the manner provided for in such agreement*." 9 U.S.C. 4 (emphasis added).

In the face of an arbitration agreement, therefore, courts "have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument [that] will support the claim." *Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564, 568 (1960). To do so would flout the parties' intent, because "[t]he [parties'] agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious." *Ibid.* As long as the arbitration agreement is itself valid and enforceable, the Arbitration Act "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on [arbitrable] issues." *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 218 (1985).

Those principles apply equally to the parties' "additional, antecedent agreement" to arbitrate questions of arbitrability. *Rent-A-Center*, 561 U.S. at 70. When the parties have agreed to delegate arbitrability to the arbitrator, the initial decision is the arbitrator's—and only the arbitrator's—to make. See *Dean Witter Reynolds*, 470 U.S. at 217. And in that circumstance, a court "ha[s] no business weighing the merits" of arbitrability. *American Manufacturing*, 363 U.S. at 568. If anything, that is all the more true in light of the "interpretive rule" this Court has applied to delegations of gateway issues of arbitrability, which requires a delegation to be "clear and unmistakable." *Howsam*, 537 U.S. at 83. If the parties have clearly and unmistakably agreed to arbitrate questions of arbitrability, a court has no license to ignore the parties' clear intent and weigh in on those questions all the same.

Yet that is exactly what the "wholly groundless" exception contemplates. The exception conflates the question of who *decides* arbitrability with the discrete question

of who *prevails* on arbitrability—and, in so doing, allows a court to address the merits of the claim of arbitrability even though the parties selected the arbitrator for that role. Indeed, courts recognizing the "wholly groundless" exception have forthrightly acknowledged that the exception "necessarily requires [them] to examine and, to a limited extent, construe the underlying agreement." *E.g.*, *Douglas*, 757 F.3d at 463; *InterDigital Communications, LLC* v. *International Trade Commission*, 718 F.3d 1336, 1346-1347 (Fed. Cir. 2013), vacated on other grounds, 134 S. Ct. 1876 (2014). As this Court has repeatedly admonished, however, that is exactly what lower courts should avoid doing in cases in which the parties have agreed to arbitrate.

The circuit conflict surrounding the "wholly groundless" exception arose precisely because certain courts, starting with the Federal Circuit, failed to heed those instructions. Not one of the decisions recognizing the "wholly groundless" exception so much as mentioned this Court's warning not to address the merits of the underlying claim when assessing arbitrability. See *Qualcomm*, 466 F.3d at 1370, 1373 n.5; *Turi* v. *Main Street Adoption Services, LLP*, 633 F.3d 496, 506-511 (6th Cir. 2011); *Douglas*, 757 F.3d at 462-464; *Simply Wireless, Inc.* v. *T-Mobile US, Inc.*, 877 F.3d 522, 528-529 (4th Cir. 2017), petition for cert. pending, No. 17-1423 (filed Apr. 9, 2018). Conversely, each of the courts that did consider this Court's guidance recognized that the "wholly groundless" section flouts it. See *Belnap* v. *Iasis Healthcare*, 844 F.3d 1272, 1286-1287 (10th Cir. 2017); *Jones* v. *Waffle House, Inc.*, 866 F.3d 1257, 1268-1271 (11th Cir. 2017); see also *Douglas*, 757 F.3d at 468 (Dennis, J., dissenting).

In defense of the "wholly groundless" exception, the court of appeals explained that interpreting the parties'

arbitration agreement was necessary to avoid "overrid[ing] the clear intent of the parties[] or reach[ing] a result inconsistent with the plain text of the contract." Pet. App. 16a (emphasis and citation omitted). In its earlier decision in *Douglas*, the court of appeals elaborated on that justification: if the claim of arbitrability was "wholly groundless," the court asserted, "surely [the party opposing arbitration] never intended that such arguments would see the light of day at an unnecessary and needlessly expensive gateway arbitration." 757 F.3d at 464.

The court of appeals' conclusion, however, does not follow from its premise. The "wholly groundless" exception necessarily assumes that the parties have clearly and unmistakably agreed to arbitrate gateway issues of arbitrability. See Pet. App. 5a-6a. But if the parties have done so, there is no basis for the further assumption that they did not intend to send any and all claims of arbitrability—regardless of their merit—to arbitration. Quite to the contrary, the parties could simply have determined that, like the arbitration of the underlying claims, the arbitration of gateway issues of arbitrability would be simpler, more expeditious, and less expensive than the litigati4on of those issues in court.

Here, there was particularly good reason for the parties—and respondent in particular—to have believed *ex ante* that the delegation of arbitrability to the arbitrator under the rules of the American Arbitration Association (to which the parties agreed in the relevant agreements, see pp. 6-7, *supra*) would be beneficial. The arbitration agreements contained forum-selection clauses providing that any arbitration would occur in North Carolina. J.A. 58. Respondent, however, is based in Texas. J.A. 26.

Agreeing to arbitrate questions of arbitrability enabled respondent to resolve those questions without hir-

ing local counsel in North Carolina. North Carolina permits out-of-state attorneys to participate in in-state arbitrations, see N.C. Rule of Prof'l Conduct 5.5(c)(3) & cmt. 7, and the AAA's rules permit parties to participate "by counsel or any other representative of the party's choosing, unless such choice is prohibited by applicable law," American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures R-26 (2013) <adr.org/commercial> (AAA Commercial Rules). The local rules of all North Carolina state and federal courts, however, require the involvement of at least one North Carolina-licensed attorney in all civil proceedings. See N.C. Gen. Stat. § 84-4.1(5); E.D.N.C. Civ. R. 83.1(c)(1), (d)-(f); M.D.N.C. Civ. R. 83.1(c)(1), (d)(1)-(2); W.D.N.C. Civ. R. 83(B)(1).

b. Beyond ignoring the federal policy in favor of arbitration and the intent of the contracting parties, the "wholly groundless" exception presents significant practical problems.

To begin with, parties select arbitration for its "efficient, streamlined procedures," *AT&T Mobility*, 563 U.S. at 344, and its "expeditious results," *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985). The "wholly groundless" exception would effectively nullify those advantages, because it is highly inefficient. Under the exception, a court could preclude arbitration whenever it concludes, based on its own interpretation of the arbitration agreement, that there is not "a legitimate argument that [the agreement] covers the present dispute." Pet. App. 11a. That would create an irresistible incentive for any party with a colorable argument against arbitration to ignore the parties' agreement to arbitrate arbitrability and challenge it in court instead. That party would have to file a lawsuit and contest a mo-

tion to compel arbitration, resulting in a potentially protracted "mini-trial" over arbitrability that would "unnecessarily complicat[e] the law and breed[] litigation from a statute that seeks to avoid it." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 275 (1995). If the moving party wins, the other party could appeal the court's determination on arbitrability as of right. See 9 U.S.C. 16(a). And if the moving party loses, it would presumably have to address the issue of arbitrability again before the arbitrator.

This case well illustrates that problem. Petitioners first moved to compel arbitration in 2012. Yet six years later—a period of time long enough for the parties' underlying claims to have been arbitrated many times over—petitioners, respondent, and the courts are still attempting to resolve the threshold question of who should decide arbitrability. And because the lower courts did not enter stays pending appeal, petitioners had to endure years of costly discovery. In this very case, therefore, the "wholly groundless" exception has trounced the efficiencies for which the parties contracted in agreeing to arbitration.

The vagueness of the "wholly groundless" exception provides additional cause for concern. The facts of this case are again instructive. By its terms, the "wholly groundless" exception would seem to apply only to claims of arbitrability that are truly frivolous. As the magistrate judge recognized, there is a plausible argument in this case—indeed, a plainly correct one—that the relevant agreements that required arbitration of respondent's claims. Pet. App. 41a-42a.

The arbitration provision in the agreements does not apply to "actions seeking injunctive relief," and respondent nominally demanded injunctive relief in its complaint (though it has never actually sought such relief). J.A. 45, 47, 58. But where an arbitration provision contains a

carve-out for injunctive relief, such a carve-out is routinely understood merely to permit injunctive relief from a court either on a preliminary basis to preserve the status quo *before* or *during* arbitration of the underlying claims, or on a permanent basis *after* the plaintiff secures an arbitral award in its favor. See pp. 8-9, *supra* (citing cases). That makes good sense: if respondent could avoid arbitration simply by tacking on a demand for injunctive relief, it would render meaningless the parties' agreement to arbitrate. Betraying its hostility to arbitration, however, the court of appeals disagreed with the magistrate judge, concluded that the foregoing argument was not even plausible, and applied the "wholly groundless" exception. See Pet. App. 16a.

The history of this case thus shows that recognition of a "wholly groundless" exception would be an invitation to mischief. As took place here, some courts will be unable to resist the temptation to refuse to compel arbitration whenever they disagree with the claim of arbitrability, regardless of whether the claim is truly "wholly groundless" or not. And parties will bog down cases with threshold litigation on the applicability of the "wholly groundless" exception.

c. To be sure, there may be cases in which a party seeks to compel arbitration but the claim of arbitrability is plainly meritless. In those cases, however, there is no reason to believe that an arbitrator will be unable to deal with the situation efficiently and expeditiously. The AAA's rules for both commercial and consumer arbitration permit a party to request a determination of arbitrability at a preliminary telephonic hearing to be held as soon as possible. See AAA Commercial Rules R-7(c), R-21(a), P-2(a)(vi)(b); American Arbitration Association, Consumer Arbitration Rules and Mediation Procedures R-14(c), R-21(a)-(b) (2014) <adr.org/consumer> (AAA

Consumer Rules). And the rules for the other major arbitration organization, JAMS, similarly permit an arbitrator to determine his jurisdiction "as a preliminary matter" via telephonic hearing. See JAMS Rules 6(a), 11(b), 16(i) (2014) <jamsadr.com/rules-comprehensive-arbitration> (JAMS Rules). The major arbitration organizations also allow parties to opt into fast-track procedures, further expediting the resolution of disputes over arbitrability. See AAA Commercial Rules, Expedited Procedures; JAMS Rule 16.1. Especially by comparison to the courts, an arbitrator should have no difficulty in efficiently dispensing with a groundless claim of arbitrability.

Moreover, an arbitrator is hardly powerless in the face of a truly frivolous claim of arbitrability. Numerous federal and state courts have recognized the authority of arbitrators under broad arbitration provisions to impose sanctions for bad-faith conduct—for example, by shifting fees and costs to the moving party (where that party does not already bear them). See, *e.g.*, *ReliaStar Life Insurance Co.* v. *EMC National Life Co.*, 564 F.3d 81, 86 (2d Cir. 2009); *Marshall & Co.* v. *Duke*, 114 F.3d 188, 190 (11th Cir. 1997), cert. denied, 522 U.S. 1112 (1998); *Todds Shipyards Corp.* v. *Cunard Line, Ltd.*, 943 F.2d 1056, 1064 (9th Cir. 1991); *Seagate Technology, LLC* v. *Western Digital Corp.*, 854 N.W.2d 750, 762 (Minn. 2014); *Thomas* v. *Prudential Securities, Inc.*, 921 S.W.2d 847, 851 (Tex. Ct. App. 1996). To the extent arbitrators have that power, parties will have even less incentive to assert plainly meritless claims of arbitrability—and there is no reason to believe that parties are routinely doing so in jurisdictions where the "wholly groundless" exception has not been recognized.

In any event, courts "cannot rely on * * * judicial policy concern[s]" to refuse to honor arbitration agreements. *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 270

(2009). While respondent has disparagingly suggested that arbitrators might "mak[e] mistakes" on the issue of arbitrability, Br. in Opp. 2 n.1, it is a foundational premise of the Arbitration Act that arbitrators will be "competent, conscientious, and impartial," *Mitsubishi Motors*, 473 U.S. at 634, and fully capable of deciding even the most complex issues, see *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 232 (1987). Courts should presume that they can trust arbitrators faithfully to analyze the scope of arbitration provisions and to refuse to allow arbitration of claims that fall outside them. The "wholly groundless" exception is at war with that presumption; in that respect, it represents a return to the bad old days of "judicial hostility to arbitration" that led Congress to enact the Arbitration Act nearly a century ago. *Green Tree Financial Corp.-Alabama* v. *Randolph*, 531 U.S. 79, 89 (2000).

* * * * *

Cases concerning arbitration often require this Court to reconcile an array of considerations, each of which may point toward a different result. This is not such a case. Here, the statutory text, precedent, and policy all support the conclusion that a court may not decline to enforce an agreement delegating questions of arbitrability to an arbitrator merely because the court believes the claim of arbitrability is "wholly groundless." The court of appeals' contrary holding was erroneous, and it cannot be allowed to stand.

CONCLUSION

The judgment of the court of appeals should be vacated, and the case remanded for further proceedings.

Respectfully submitted.

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No. 17-1272

In the Supreme Court of the United States

HENRY SCHEIN, INC., ET AL., PETITIONERS

v.

ARCHER AND WHITE SALES, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

The Federal Arbitration Act (FAA) authorizes parties "aggrieved" by the "failure, neglect, or refusal of another to arbitrate under a written agreement" to "petition" for an order compelling arbitration. 9 U.S.C. 4. It further instructs courts to grant relief "upon being satisfied" of the counterparty's "failure to comply." *Ibid.*

The question presented is:

Whether the FAA requires courts to compel arbitration where the ultimate contention that the dispute is subject to arbitration is "[im]plausible," "without merit," and "wholly groundless."

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT

Petitioners are Henry Schein, Inc., Danaher Corporation, Instrumentarium Dental Inc., Dental Equipment LLC, Kavo Dental Technologies, LLC, and Dental Imaging Technologies Corporation, the appellants below and defendants in the district court.

Respondent is Archer and White Sales, Inc., the appellee below and plaintiff in the district court. Archer and White Sales, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

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In the Supreme Court of the United States

No. 17-1272

HENRY SCHEIN, INC., ET AL., PETITIONERS

v.

ARCHER AND WHITE SALES, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

INTRODUCTION

This case involves the "wholly groundless" exception to arbitration demands: even if parties have generally agreed to let an arbitrator decide if a dispute is subject to arbitration, courts are not required to compel arbitration where the claim of arbitrability is "[im]plausible," "without merit," and "wholly groundless."

Contrary to petitioners' contention, this longstanding rule is sound. It is supported by the Federal Arbitration Act's plain text, structure, purpose, and history. It enforces basic principles of contract law, promotes traditional litigation norms, and reflects simple common sense. It prevents abusive litigation tactics and avoids a pointless detour for an arbitrator to confirm what everyone already knows: the dispute at issue is not even plausibly subject to arbitration.

Petitioners insist that the sky will fall unless courts are forced to reward frivolous, illegitimate arbitration demands. Yet the "wholly groundless" doctrine has been applied in multiple circuits for decades, and petitioners have not mustered even the slightest showing that it has interfered with the effective arbitration of disputes. Courts have routinely, and faithfully, reserved the exception for the rarest of cases; *any* legitimate argument defeats its application. This established doctrine simply recognizes the good faith inherent in all contracts and Congress's unwillingness to impose pointless burdens on parties and the courts.

As the court of appeals stated unequivocally, had petitioners below offered even a plausible reading of the contract, the court would have compelled arbitration. Their aggressive attempt to rewrite the contract's unambiguous terms flunked that exceptionally low bar. The "wholly groundless" doctrine protects the integrity of the parties' agreement without casting any doubt on the viability of arbitration as a useful mechanism of dispute resolution. Petitioners' contrary view, by contrast, is inconsistent with the FAA and its animating principles. The judgment below should be affirmed.

STATUTORY PROVISIONS INVOLVED

In addition to those provisions reproduced in petitioners' brief (at 2-3), Section 9 of the Federal Arbitration Act, 9 U.S.C. 9, provides in pertinent part:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award,

> and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title * * * .

And Section 10 of the Federal Arbitration Act, 9 U.S.C. 10, provides in pertinent part:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
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> * * * * *
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> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
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> * * * * *

STATEMENT

1. This case arises out of an antitrust conspiracy in the market for dental equipment and supplies. Respondent is a small, family-owned distributor in the industry. C.A. App. 21. Unlike most of its competitors, respondent offers low prices by using e-commerce to reduce its overhead. *Id.* at 21-22. Unnerved by this competition, respondent's larger competitors (including petitioner Henry Schein, Inc.) conspired to maintain supracompetitive margins by not competing on price. *Id.* at 33-34. To protect these margins, Schein and its co-conspirators pressured major manufacturers, including certain petitioners here, by threatening to drop their products unless they stopped working with low-margin distributors, including respondent. *Ibid.* Because manufacturers are dependent on major distributors for sales, the manufacturers fell in line and joined the

anticompetitive conspiracy. By 2002, manufacturers began restricting or terminating respondent's sales territories. And by 2014, Danaher Corporation and its subsidiaries (also petitioners here) completely terminated respondent's distribution rights. To this day, manufacturers continue to restrict respondent's ability to distribute products due to threats from Schein and its co-conspirators.

The harm from petitioners' conduct is extensive, hurting other low-margin distributors and also dentists (who, as the end users, ultimately pay inflated prices). Petitioners' conduct has prompted investigations by the FBI, the FTC, the Texas Attorney General, and the Arizona Attorney General, as well as an antitrust lawsuit by a class of dentists who purchased overpriced dental products (and recently entered a tentative $80 million settlement, see Jeff Overley, *Dentists Get $80M From Supply Cos. To End Collusion Case*, Law360 (Aug. 30, 2018) < https://tinyurl.com/80Msettlement>).[1]

After enduring this illegal conduct for years (with no end in sight), respondent sued petitioners in August 2012 for violating the Sherman Act. C.A. App. 16. Respondent sought both damages and "injunctive relief," because

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[1] See Complaint, *In re Benco Dental Supply Co.*, FTC No. 9379 (Feb. 12, 2018); Agreed Final Judgment and Stipulated Injunction Between the State of Texas and Patterson Companies, Inc., *Texas* v. *Patterson Cos.*, No. D-1-GN-18-001916 (126th Judicial Dist. Apr. 19, 2018); Agreed Final Judgment and Stipulated Injunction Between the State of Texas and Henry Schein, Inc., *Texas* v. *Henry Schein, Inc.* No. D-1-GN-17-003749 (261st Judicial Dist. Aug. 3, 2017); Agreed Final Judgment and Stipulated Injunction Between the State of Texas and Benco Dental Supply, *Texas* v. *Benco Dental Supply Co.*, No. D-1-GN-15-001386 (353d Judicial Dist. Apr. 9, 2015); *In re Dental Supplies Antitrust Litig.*, No. 1:16-cv-00696 (E.D.N.Y.).

"[t]he violations * * * are continuing and will continue unless injunctive relief is granted." C.A. App. 35.[2]

2. Shortly after respondent filed its original complaint, a single petitioner, Dental Equipment, moved to compel arbitration under its distribution agreement with respondent. The agreement provided for arbitration of certain claims: "[a]ny dispute arising under or related to this Agreement (*except for actions seeking injunctive relief* and disputes relating to trademarks, trade secrets or other intellectual property of [the manufacturer]) shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association." J.A. 58 (emphasis added). The remaining petitioners then also requested arbitration; rather than invoke their own right to arbitrate, however, they argued that respondent was bound under equitable estoppel to arbitrate against everyone, even though respondent's sole arbitration agreement was with Dental Equipment.

In May 2013, the magistrate judge granted the motions to compel arbitration and stayed the case. Pet. App. 39a-44a. The magistrate judge recognized that "the exception carved out for actions seeking injunctive relief is problematic to the motions to compel arbitration." *Id.* at 41a. And the magistrate judge further noted that "[i]f there were no reasonable construction of the contract that allowed for arbitration, there would be nothing for an arbitrator to decide." *Ibid.* But the magistrate judge nevertheless felt there was a "plausible construction" calling for arbitration, because damages, not injunctive relief, was "the predominant relief sought." *Ibid.* In so finding, the

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[2] Respondent amended its complaint in August 2017 to bring its allegations current after a three-year litigation delay and to join two additional large distributors as defendants.

magistrate judge did not identify any language in the contract supporting the view that the "predominant" relief was controlling (or even *relevant*); nor did the magistrate judge identify any language otherwise limiting the carve-out ("*actions* seeking injunctive relief") to mean anything other than what it plainly says—an *action* seeking injunctive relief. Pet. App. 39a-44a. Because the magistrate judge found that the agreement's adoption of the AAA rules implicitly delegated arbitrability issues to the arbitrator, it compelled arbitration. *Id.* at 41a.[3]

Having found that the arbitration clause applied, the magistrate judge also ruled that the "non-signatory defendants c[ould] avail themselves" of the agreement. Pet. App. 42a-43a (invoking the Fifth Circuit's two-prong test for equitable estoppel).

Respondent immediately filed a "motion for reconsideration" of the magistrate judge's order. C.A. App. 444. The motion was fully briefed by early July 2013, but the case remained stayed until the district court sua sponte scheduled a status conference in October 2016. *Id.* at 626.[4]

3. The district court rejected the magistrate judge's ruling and denied petitioners' motions to compel arbitration. Pet. App. 18a-38a.

At the outset, the district court recognized this Court's "'strong pro-court presumption'" on gateway issues of arbitrability. Pet. App. 23a (quoting *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 86 (2002)). Unlike the

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[3] The magistrate judge did not address whether the carve-out for "actions seeking injunctive relief" also had implications for the scope of the delegation clause.

[4] The extended delay was the apparent result of confusion regarding whether respondent's motion sought reconsideration from the magistrate judge or review (in the form of objections) by the district court. See Pet. App. 20a. The district court construed the filing as "objections to the Order" and decided them accordingly. *Ibid.*

usual presumption in favor of arbitration, those gateway questions are reserved for "judicial determination [u]nless the parties clearly and unmistakably provide otherwise." *Ibid.* (quoting *Howsam*, 537 U.S. at 83) (internal quotation marks omitted); see also *id.* at 24a ("'[t]he law presumes that courts have plenary power to decide the gateway question of a dispute's 'arbitrability'") (quoting *Houston Ref., L.P.* v. *United Steel, Paper & Forestry, Rubber, Mfg.*, 765 F.3d 396, 408 (5th Cir. 2014)).

The district court then conducted that analysis under the "narrow circumstances" here, and rejected the magistrate judge's ruling on "two independent rationales." Pet. App. 32a.[5]

First, the district court found the parties "did not clearly and unmistakably agree to arbitrate the arbitrability of actions seeking injunctive relief." Pet. App. 32a. As the court explained, the agreement's carve-out for such "actions" was "clear on its face." *Id.* at 27a. "[T]he arbitration clause here 'cabins application of the AAA rules to disputes "arising under or related to" the Agreement that are *not* "actions seeking injunctive relief" or "disputes relating to trademarks, trade secrets or other intellectual property of [the manufacturer]."'" *Id.* at 33a. It found petitioners' contrary reading violated the clause's "plain language," tried to "read" limitations into the agreement, and lacked "any substantive basis." *Id.* at 27a-28a. "Indeed," the court explained, "it would be senseless to have the AAA rules apply to proceedings that are not subject to arbitration." *Id.* at 34a.

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[5] The district court separately noted that "[t]here is no *express* delegation clause in the [A]greement," but followed Fifth Circuit authority holding that "the adoption of the AAA rules" implicitly delegates arbitrability in some cases. Pet. App. 32a-33a.

The court thus concluded that the case "falls squarely within the clause excluding actions like this from arbitration," and it refused to "re-write the terms of the Parties' agreement to accommodate a party—notably, the party that drafted the agreement—that could have negotiated for more precise language." Pet. App. 30a, 34a (footnote omitted).

That decision alone was a sufficient basis for rejecting petitioners' motion. *Id.* at 35a n.5 ("even if [the "wholly groundless"] test ha[d] not been adopted by the Fifth Circuit," "the Court finds that there is not clear and unmistakable evidence that the Parties intended to send the question of arbitrability to an arbitrator").[6]

Second, the court held that even had it found a clear and unmistakable delegation, petitioners would still lose "in these unique circumstances" under the Fifth Circuit's "narrow" exception for "'wholly groundless'" arbitrability claims. Pet. App. 34a-37a (quoting *Douglas* v. *Regions Bank*, 757 F.3d 460, 463-464 (5th Cir. 2014)). As the court explained, the Fifth Circuit's test reflects "'the parties' intent'": no one agrees to an "absurd[]" process where a plaintiff is compelled "to go to an arbitrator merely to have the arbitrator 'flatly' explain that the claim did not fall within the scope of the agreement and promptly send plaintiff back to court." *Id.* at 35a-36a. That was precisely the "unequivocal response" the court expected here: petitioners' argument was "wholly without merit" given the clause's "plain language," and it would be "senseless to refer the issue of arbitrability to the arbitrator, only to have the arbitrator read the plain language of the clause and then send the Parties back to this Court." *Id.* at 36a-37a.

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[6] The district court also highlighted that the "arbitration clause in this case is unique," and it "differs" from "standard arbitration clause[s] suggested by the [AAA]." Pet. App. 28a.

Without a "plausible" argument that the dispute was subject to arbitration, the "wholly groundless" exception applied under "the precise facts of this case." *Id.* at 38a.

In so ruling, the court stressed that this "narrow" exception was limited to "'exceptional' circumstances." Pet. App. 37a (quoting *Kubala* v. *Supreme Prod. Servs., Inc.*, 830 F.3d 199, 202 n.1 (5th Cir. 2016)). Indeed, the court explained, the rule "'is not a license for the court to prejudge arbitrability disputes more properly left to the arbitrator pursuant to a valid delegation clause,'" and any "'plausible' argument" is enough to require arbitration. *Ibid.* (quoting *Kubala*, 830 F.3d at 202 n.1). But given the utter implausibility of petitioners' arguments, the exception "is appropriate in this particular case." *Ibid.*[7]

4. Petitioners filed an interlocutory appeal, and respondent urged affirmance on each of the district court's independent grounds: (i) "[t]he parties did not delegate the question of arbitrability to the arbitrator," and (ii) even if they had, petitioners' "arbitrability argument is 'wholly groundless.'" Resp. C.A. Br. 17, 26.

5. The court of appeals affirmed. Pet. App. 1a-17a.

First, the court "ask[ed] if the parties 'clearly and unmistakably' delegated the issue of arbitrability." Pet. App. 6a. After examining the parties' contentions, it found a "strong argument" that the delegation clause does not apply to cases "within the [injunctive-relief] carve-out." *Id.* at 10a. It rejected petitioners' notion that "any mention in the parties' contract of the AAA Rules trumps all other contract language." *Ibid.* On the contrary, the court found, "the interaction between the AAA Rules and the

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[7] Having rejected petitioners' arguments on multiple grounds, the court elected not to decide a potential *additional* ground for denying arbitration: "whether the third parties to the arbitration clause in this case can enforce such arbitration clause." Pet. App. 37a-38a.

carve-out is at best ambiguous," and controlling state law requires any ambiguity to be "'construed against the drafter[s]'"—here, petitioners. *Ibid.* (quoting *T.M.C.S., Inc.* v. *Marco Contractors, Inc.*, 780 S.E.2d 588, 597 (N.C. Ct. App. 2015)).

Despite these "strong" points against petitioners' reading, the court did not ultimately decide whether the agreement reflected a "clear and unmistakable" delegation. Pet. App. 10a-11a. Instead, the court found it sufficient to reject petitioners' reading under the "'wholly groundless' inquiry." *Id.* at 11a.[8]

In explaining that inquiry, the court emphasized that the "wholly groundless" exception was a "narrow escape valve," and that arbitration should be compelled "'in almost all cases.'" Pet. App. 5a, 11a. While the doctrine's exact "contours" are "not yet fully developed," the court confirmed that it does not apply if there is *any* "legitimate argument that th[e] arbitration clause covers the present dispute." *Id.* at 11a, 15a. It was only where the party's assertions are "[im]plausible" that the exception applies: "This limited inquiry allows the parties to avoid jumping through hoops to begin arbitration only to be sent directly back to the courthouse." *Id.* at 11a, 12a n.35.

Looking to the facts here, the court determined this was the rare case warranting the doctrine's application. Pet. App. 11a-16a. The court examined petitioners' arguments in favor of arbitrability and declared each had "no footing within the four corners of the contract." *Id.* at 16a. The court found the contract "'clear and unambiguous,'" and found the arbitration clause "expressly exclude[d] certain types of disputes." *Id.* at 12a-13a, 15a-16a. Like the district court, the court of appeals saw "no plausible

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[8] The court of appeals also noted the district court's observation that this arbitration clause has atypical language. Pet. App. 12a.

argument that the arbitration clause applies here to an 'action seeking injunctive relief.'" *Id.* at 16a; see also *id.* at 13a (repeating the district court's conclusion that petitioners' reading was "'wholly without merit'"). Petitioners' reading, in short, was at odds with "the clause's plain meaning." *Id.* at 16a.

The court of appeals concluded petitioners' arguments were "wholly groundless," and it thus affirmed the order denying petitioners' motion to compel arbitration. Pet. App. 16a-17a.

6. Both the district court and the court of appeals denied petitioners' requests for a stay pending appeal. Pet. App. 45a. The case proceeded through discovery and virtually all other pretrial phases and was set for trial in May 2018. This Court granted a stay (No. 17A859) pending its disposition of the petition for a writ of certiorari and subsequently granted the petition.

SUMMARY OF ARGUMENT

According to petitioners, the "wholly groundless" doctrine is yet another example of courts seeking to undermine arbitration agreements and flout the FAA. If the parties agreed to delegate arbitrability determinations to an arbitrator, petitioners say they have an absolute right to compel arbitration—even when their arbitrability claim is illegitimate or frivolous.

Petitioners are mistaken. Congress did not endorse a pointless and wasteful detour for an arbitrator to confirm what everyone already knows. The "wholly groundless" doctrine provides a limited upfront check; it applies only where the movant cannot identify a single, plausible argument supporting arbitrability. It avoids needless expense and delay. This "narrow" exception has its roots in the FAA's text, structure, purpose, and history. It has been

applied in multiple circuits for decades without any obvious disturbance to the strong federal policy favoring arbitration. Petitioners' efforts to upset this doctrine are baseless, and the judgment below should be affirmed.

I. A. The doctrine has an obvious grounding in the statutory text. A counterparty has not "fail[ed] to comply" with an arbitration clause (9 U.S.C. 4) if there is no plausible basis for reading the clause to cover the case. While the FAA requires courts to compel arbitration where the underlying *merits* are frivolous, it has drawn a clear textual distinction for arbitrability. The statute does not authorize courts to entertain a pointless detour only to watch the case, predictably, return immediately to court.

This plain-text reading is reinforced by the statutory design. Section 10(a)(4) already requires courts to vacate arbitration awards where arbitrators exceed their powers—which they necessarily do by deciding a dispute that does not even arguably belong in arbitration. Section 10(a)(4) thus replicates on the backend what Section 4 provides on the front. It is absurd to read the Act to eliminate this filter only on the front end, where it can avoid ex ante the terrible waste and inefficiency of enduring a do-over in court after a full arbitration.

B. The FAA's plain text is reinforced by its statutory purpose.

1. Arbitration is a matter of contract, and traditional contract principles foreclose petitioners' claim. No contracting party agrees to tolerate frivolous, bad-faith actions. A delegation clause is necessarily limited to resolving *genuine* disputes; there is no basis to presume that parties intended to be subjected to baseless demands that promise only pointless expense and delay.

The Court routinely looks to common-sense presumptions about parties' intent when considering questions under the FAA. The presumed intent here is obvious: No one

agrees to a wasteful detour so the arbitrator can confirm the inevitable. Petitioners' mechanical rule blinks reality and does not reflect how contracts are sensibly read. It would undermine the parties' actual expectations, and should be rejected.

2. The "wholly groundless" doctrine also reflects traditional legal norms. The FAA was enacted to provide a judicial mechanism for enforcing arbitration agreements; it puts arbitration agreements on equal (but not *greater*) footing with other contracts. But all contracts are enforced against the backdrop of general legal principles, including simple baselines of acceptable conduct. Those baseline rules do not tolerate frivolous or abusive filings, and they certainly do not permit parties to use the courts as a tool for *compelling* meritless or inappropriate action. Nothing in the FAA creates an exception to these traditional norms. The "wholly groundless" doctrine respects the underlying purposes of the FAA while protecting the parties and the system from abuse.

3. This common-sense doctrine also promotes the chief benefits of arbitration: the fast and efficient resolution of disputes. There is nothing fast or efficient about permitting parties to use frivolous arbitration demands to add cost and delay. Those implausible demands only set up the inevitable: the wasted time and effort of a doomed trip for the arbitrator to confirm what everyone already knows: the dispute belongs in court.

The "wholly groundless" exception, by contrast, achieves the FAA's objectives. The judicial check occurs in summary fashion; it does not displace the arbitrator's role in deciding *genuine* disputes, but is limited to ferreting out the exceptionally rare case that does not even *plausibly* belong in arbitration.

The only time petitioners' view has any practical effect—aside from imposing undue burdens on parties and

courts—is when an arbitrator would *disagree* with the judiciary and declare an "implausible" argument the winner. And the result of such an outcome would be starting over in court after the award is eventually vacated under Section 10(a)(4).

Petitioners have not yet shown that eliminating this modest exception would protect legitimate arbitration rights in more than the tiniest subset of cases (if any such cases exist). The FAA's policies are advanced by maintaining this sensible check on groundless demands.

C. The FAA's history reinforces the doctrine's viability. Congress considered the importance of preserving a modest judicial role at the FAA's enactment, and it followed the example of the New York courts—which already endorsed their own version of the "wholly groundless" doctrine.

And for decades now, courts have applied that doctrine in multiple jurisdictions. There is no indication that this minor judicial review over meritless demands imposes any actual cost on the arbitration system.

II. Petitioners' remaining efforts to undermine the doctrine are unavailing.

First, the "wholly groundless" exception is not anti-arbitration. It does not presume that arbitrators are incapable of deciding arbitrability correctly; on the contrary, it applies when the issue is so insubstantial that no one could possibly get it wrong—meaning that the game is not worth the candle. The doctrine thus attacks *pointless* arbitration, but not arbitration itself.

Second, petitioners insist that the doctrine will burden the system and harm arbitration. But if that were true one would expect to see—*evidence of burden and harm*. Instead, there is a paucity of cases applying the doctrine at any level, and even fewer that foreclosed arbitration.

There is zero evidence that this "narrow" backdrop frustrates legitimate arbitration demands.

Third, petitioners have misstated the factual backdrop of this case. For one, the courts below did not find that the parties indeed delegated arbitrability to the arbitrator. The district court flatly rejected petitioners' arguments, and the Fifth Circuit effectively did the same—explaining why petitioners were wrong before deciding the case on alternative grounds. This fact-bound issue is outside the question presented, but petitioners err in suggesting the contract supports their views on this question.

Finally, petitioners point to the extended duration of these proceedings—"six years"—as evidence of the steep costs of the "wholly groundless" exception. This is misleading. The case was lost below for years in a void between the magistrate judge and the district court. And the additional effort and expense is attributable to petitioners' aggressive behavior: the parties were not merely litigating the "wholly groundless" exception, but multiple issues related to petitioners' marginal attempts to avoid litigating in court. The "wholly groundless" doctrine does not generate pointless costs and expense; it is a tool for avoiding them.

ARGUMENT

I. THE "WHOLLY GROUNDLESS" DOCTRINE IS CONSISTENT WITH THE FAA'S TEXT, STRUCTURE, PURPOSE, AND HISTORY

A. The FAA's Text And Structure Support The "Wholly Groundless" Exception

According to petitioners, the "wholly groundless" exception has no support in the FAA's text. Pet. Br. 23-29. Petitioners are wrong. The FAA provides a clear textual basis for the doctrine, and petitioners' contrary reading makes nonsense of the statutory scheme.

1. a. Under Section 4, Congress expressly required that courts be "satisfied" that a nonmovant "fail[ed] to comply" before ordering arbitration. 9 U.S.C. 4. The failure to comply is the failure to arbitrate under the party's agreement. If a dispute is not even "arguably" subject to arbitration, there is no possible "failure to comply" by filing in court. See, *e.g.*, *Turi* v. *Main St. Adoption Servs., LLP*, 633 F.3d 496, 507 (6th Cir. 2011). And without a "*bona fide* dispute on arbitrability" (*Kubala* v. *Supreme Prod. Servs., Inc.*, 830 F.3d 199, 202 n.1 (5th Cir. 2016)), a court cannot be "satisfied" under Section 4 for purposes of ordering arbitration.[9]

This provision thus provides an obvious textual basis for the "wholly groundless" exception. When an arbitration claim is utterly meritless, there is no possible "failure to comply." This is precisely what the "wholly groundless" inquiry seeks to tease out: if there is *any* "plausible" argument, the courts will compel arbitration. *Douglas*, 757 F.3d at 463; *Turi*, 633 F.3d at 511. But where a movant's claim is baseless or illegitimate, the court cannot be "satisfied" that the order compelling arbitration is appropriate. See *Qualcomm Inc.* v. *Nokia Corp.*, 466 F.3d 1366, 1370, 1373 n.5 (Fed. Cir. 2006). "[E]ven where the parties delegate to the arbitrator the authority to decide which issues are subject to arbitration, the court must still determine, as a threshold matter, whether the claims in the

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[9] Section 3 imposes a comparable restriction before granting a stay pending arbitration: the court may issue a stay only "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration." 9 U.S.C. 3. "If the district court finds that the assertion of arbitrability is 'wholly groundless,' then it may conclude that it is not 'satisfied' under [S]ection 3, and deny the moving party's request for a stay." *Qualcomm*, 466 F.3d at 1371.

instant dispute 'arguably fall within the contemplated scope' of the parties' agreement." *Turi*, 633 F.3d at 507.[10]

In short, petitioners cannot explain how a party "fail[ed] to comply" simply because it filed a claim in court *that belongs in court*.[11]

b. In response, petitioners repeatedly attack the text's plain meaning, but their efforts fall short.

First, petitioners argue (Br. 20-21) that courts are required to compel arbitration "whether the claims of the party seeking arbitration are 'arguable' or not, indeed even if it appears to the court to be frivolous." *AT&T Techs., Inc.* v. *Comm'cns Workers of Am.*, 475 U.S. 643, 649-650 (1986). While that may be true for arguments about the *underlying merits*, it is not true for arguments about *arbitrability*. The FAA's text draws a clear distinction between the two. When a party's arbitration demand

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[10] This is consistent with a long tradition of courts teasing out sham allegations. Cf. *Bell* v. *Hood*, 327 U.S. 678, 682-683 (1946) (refusing to exercise federal jurisdiction where the asserted "federal" claim is "wholly insubstantial and frivolous").

[11] For similar reasons, a movant is not "aggrieved" (9 U.S.C. 4) by a counterparty's decision to litigate a "dispute that plainly has nothing to do with the subject matter of an arbitration agreement." *Turi*, 633 F.3d at 507. No one is "aggrieved" by being denied the opportunity to arbitrate a frivolous demand. "Otherwise, the delegation of authority to the arbitrator to decide the scope of an arbitration agreement would require the parties to take all issues—no matter how unrelated these issues are to the parties' arbitration agreement—to the arbitrator for a threshold determination regarding arbitrability before such issues could properly be brought in court." *Ibid.*

Petitioners latch onto the fact that Section 3 does not repeat the word "aggrieved" in imposing a similar restriction (Br. 27), but this misses the point. The word "aggrieved" in Section 4 merely reinforces the notion that only parties with "*bona fide*" arbitration demands are entitled to relief. *Kubala*, 830 F.3d at 202 n.1. It does not do the work by itself. See 9 U.S.C. 4 (requiring the movant to "satisfy" the court that the counterparty "fail[ed] to comply").

is frivolous, the court cannot be "satisfied" of a "failure to comply." 9 U.S.C. 4. But there is no textual basis for refusing to compel arbitration because the underlying *claims* are frivolous. *AT&T Techs.* thus makes perfectly good sense, but it has no application in this context.

Moreover, Congress had good reason to draw the line that it did: When the underlying merits are frivolous, *someone* has to dispose of the claim, no matter how baseless it is. The parties still gain efficiencies by dispatching the claim in arbitration. But it benefits no one to add delay and expense with a pointless detour for the arbitrator to confirm that a dispute is not even "'arguably'" subject to arbitration. *Turi*, 633 F.3d at 507.

Second, petitioners argue that "'[a]n agreement to arbitrate a gateway issue is simply an additional, antecedent agreement,'" and respondent "fail[ed] to comply" with *that* agreement even if the actual dispute is not subject to arbitration. Br. 3 (quoting *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 70 (2010)); see also Br. 25 ("The relevant 'issue' here is *arbitrability*, and the relevant 'agreement' is the parties' agreement to delegate *arbitrability* to the arbitrator.").

This argument is specious. The "antecedent agreement" may be a separate agreement, but it does not exist in a vacuum. The entire point of an arbitration clause is to arbitrate the *underlying* claims. If there is no plausible argument that the case actually belongs in arbitration, the delegation issue becomes academic. Indeed, even petitioners presumably would agree that they could not invoke the "antecedent" agreement while *conceding* the underlying dispute is not arbitrable.

Where the arbitration demand is "implausible," the nonmovant does not "fail[] to comply" in any real-world sense.

Third, petitioners argue that the "wholly groundless" inquiry has no foothold in Section 4, because that provision focuses exclusively on "'the *making* and *performance* of the agreement to arbitrate.'" Br. 24-25 (quoting *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967)). But this proves *respondent's* point. The "wholly groundless" inquiry focuses on both the "making" and "performance" of the agreement.

The "making" asks whether the parties made an agreement to subject themselves to implausible or illegitimate demands, all designed to waste their time and resources and frustrate their rights to proceed in court. "[A]rbitration is a matter of contract" (*Rent-A-Center*, 561 U.S. at 67), and traditional principles of contract law foreclose the presumption that parties intended to tolerate this kind of abusive conduct. See Part I.B, *infra*. The "wholly groundless" exception merely reflects this common-sense understanding of the parties' intent. See, *e.g.*, *Douglas*, 757 F.3d at 463-464.

And the "performance" goes to the very heart of the inquiry. A party does not fail to "perform" by filing a lawsuit that is in fact *not* subject to arbitration, a point made clear where a dispute "plainly has nothing to do with the subject matter of an arbitration agreement." *Turi*, 633 F.3d at 507. "[T]he 'wholly groundless' inquiry allows the district court to determine whether it is 'satisfied' pursuant to [Section 4] while also preventing a party from asserting any claim at all, no matter how divorced from the parties' agreement, to force an arbitration." *Qualcomm*, 466 F.3d at 1373 n.5. A nonmoving party does not "fail[] to

comply" (contra Pet. Br. 25) where the arbitration demand is illegitimate and "[im]plausible." *Kubala*, 830 F.3d at 202 n.1.[12]

2. Respondent's reading of Section 4 is confirmed by Section 10(a)(4). Petitioners' view, by contrast, makes nonsense of the statutory scheme.

a. Section 10(a)(4) requires vacating an award if the arbitrators "exceeded their powers." 9 U.S.C. 10(a)(4). It applies even where parties delegate the threshold arbitrability determination to the arbitrator. See *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 943 (1995) (explaining that the arbitrability determination should be reviewed under the same "standard courts apply when they review any other matter that parties have agreed to arbitrate").

If an arbitration demand is "wholly groundless," then the arbitrators necessarily will have exceeded their powers by proceeding with the arbitration. A "wholly groundless" demand is not "a claim which *on its face* is governed by the contract." *United Paperworkers Int'l Union* v. *Misco, Inc.*, 484 U.S. 29, 36-37 (1987) (emphasis added) (quoting *Steelworkers* v. *Am. Mfg. Co.*, 363 U.S. 564, 567-568 (1960)). It is not one "'even arguably construing or applying the contract'" (*Oxford Health Plans LLC* v. *Sutter*,

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[12] Petitioners also argue that the "wholly groundless" exception is inconsistent with Section 2, which limits the available grounds for "invalidat[ing]" arbitration agreements. Br. 28-29 (citing 9 U.S.C. 2). This is wrong. The "wholly groundless" exception does not seek to "invalidate" the parties' agreement, but to *enforce* it. No one agrees to tolerate baseless or abusive conduct in a contract; that background presumption automatically limits *all* agreements, even where this (obvious) caveat is not spelled out. *Douglas*, 757 F.3d at 463-464; Part I.B, *infra*. In any event, the "wholly groundless" inquiry has its roots in other provisions of the FAA (*e.g.*, 9 U.S.C. 4), not Section 2.

569 U.S. 564, 569 (2013)), and it is not one "represent[ing] a plausible interpretation of the contract" (*George Day Constr. Co.* v. *United Bhd. of Carpenters & Joiners, Local 354*, 722 F.2d 1471, 1476-1477 (9th Cir. 1984)). It is effectively an invitation to "stray[] from interpretation and application of the agreement" and "dispense[] [one's] own brand of industrial justice." *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671 (2010) (internal quotation marks omitted); see also *Misco*, 484 U.S. at 38 ("[t]he arbitrator may not ignore the plain language of the contract").[13]

In the rare instances in which arbitrators overstep these bounds, courts are authorized to vacate the award. See, *e.g.*, *Kalb* v. *Quixtar, Inc.*, No. 3:07-cv-1061, 2008 U.S. Dist. LEXIS 25015, at *18 (M.D. Fla. Mar. 28, 2008) ("[A] court may vacate an arbitration award 'where the arbitrators exceeded their powers.' 9 U.S.C. 10. If it is later determined that the claims are not arbitrable, any arbitration award may be vacated as exceeding the scope of the arbitration agreement."); *Holz-Her U.S., Inc.* v. *Monarch Mach., Inc.*, No. 3:97CV56, 1998 U.S. Dist. LEXIS 15394, at *23-*24 (W.D.N.C. July 24, 1998) (holding that arbitrators exceeded their powers by deciding a matter that the parties had not agreed to submit to arbitration).

b. Section 10(a)(4) thus replicates on the backend what Section 4 provides on the front. This emphatically confirms respondent's reading of Section 4, and petitioners have no answer for how their argument makes sense in light of these tandem provisions.

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[13] The parallel between the "exceeding powers" doctrine and the "wholly groundless" exception is obvious: a "wholly groundless" argument, for example, is "[im]plausible" (*Douglas*, 757 F.3d at 463), has no "footing within the four corners of the contract" (Pet. App. 16a), and does not "'arguably fall'" within the agreement's scope (*Turi*, 633 F.3d at 507).

Reading the provisions together reveals a coherent statutory scheme. Congress imposed effectively the same standard under each section—a limited check for minimum plausibility. One applies at the front-end and the other at the back. Section 10(a)(4) gives courts the authority to ask whether the arbitrators exceeded their powers, which includes the ability to ask whether the dispute was subject to arbitration in the first place; Section 4's "wholly groundless" exception simply mirrors that identical check prior to arbitration, at a time when it avoids the pointless waste of time and resources.

Put simply, if courts have the power (under Section 10(a)(4)) to vacate awards after months or years of costly arbitration, then surely courts have the power (under Section 4) to make the same determination where the result is a foregone conclusion. There is no reason to read the FAA to force parties to endure an expensive and futile detour just to obtain an unenforceable arbitration award.

Petitioners' contrary view sets up a bizarre statutory design. Petitioners cannot explain why Congress would permit courts to review the process on the backend but not the front. There is no reason to construe Section 4 (or the "wholly groundless" doctrine) in a manner that leaves the courts powerless to do anything until after parties have predictably wasted months or years in a doomed arbitration.

Once Congress made clear that courts have a role after an award is entered, it is absurd to think Congress did not impose the same filter on the front end. Section 4's plain text captures the "wholly groundless" exception, and petitioners' effort to undermine this common-sense doctrine should be rejected.

B. The FAA's Statutory Purpose Is Advanced By The "Wholly Groundless" Exception

Contrary to petitioners' contention, the "wholly groundless" exception also promotes the FAA's statutory purpose. It supports basic principles of contract law, enforces traditional litigation norms, and is consistent with the FAA's history.

1. Arbitration is a matter of contract, and the "wholly groundless" doctrine comports with basic contract-law principles

The "wholly groundless" doctrine promotes basic contract-law principles, and these principles foreclose petitioners' claim.

a. "[A]rbitration is a matter of contract" (*Rent-A-Center*, 561 U.S. at 67), and the parties' "intentions" control. *Stolt-Nielsen*, 559 U.S. at 682. There is no basis for presuming that the parties intended courts to compel arbitration where the contract does not even *plausibly* authorize arbitration. No contract grants a right to assert implausible claims or waste everyone's time with pointless detours for an arbitrator to confirm the obvious. A delegation clause reflects the parties' agreement to resolve *legitimate* arbitrability issues before an arbitrator (*Kubala*, 830 F.3d at 202 n.1); it is not a license for the other side to subject a party to frivolous claims. See, *e.g.*, *McCarroll* v. *L.A. County Dist. Council of Carpenters*, 315 P.2d 322, 333 (Cal. 1957).

The "wholly groundless" test simply honors "'the parties' intent'":

> When [plaintiff] signed the arbitration agreement containing a delegation provision, did she intend to go through the rigmaroles of arbitration just so the arbitrator can tell her in the first instance that her claim has nothing whatsoever to do with her arbitration

> agreement, and she should now feel free to file in federal court? Obviously not.

Douglas, 757 F.3d at 464.

This Court routinely makes common-sense presumptions about the parties' intent when considering questions under the FAA. *E.g.*, *Stolt-Nielsen*, 559 U.S. at 685 (asking about the parties' "presumed" intent for class-action arbitration); *First Options*, 514 U.S. at 945 (asking the parties' "likely" thinking with delegation clauses). And the Court crafts "'interpretive rule[s]'" based on "assumption[s] about the parties' expectations." *Rent-A-Center*, 561 U.S. at 70 n.1; see also *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002).

"In circumstance[s] where contracting parties would likely have expected a court to have decided the gateway matter," the Court "assume[s] that is what they agreed to." *Rent-A-Center*, 561 U.S. at 70 n.1 (internal quotation marks and citation omitted). That principle is dispositive here. It is safe to assume parties intended courts to refuse arbitration in the face of baseless demands that promise only gratuitous costs and delay. *Turi*, 633 F.3d at 511. Contract law ultimately seeks to identify a meeting of the minds. There is no conceivable meeting of the minds that justifies the lodging of meritless claims. And the parties did not have to include an explicit caveat ("but no frivolous arbitration demands") to make that clear.

As a matter of common sense, "even where the parties expressly delegate to the arbitrator the authority to decide the arbitrability of the claims related to the parties' arbitration agreement, this delegation applies only to claims that are at least *arguably* covered by the agreement." *Turi*, 633 F.3d at 511; see also David Horton, *Arbitration about Arbitration*, 70 Stan. L. Rev. 363, 428

(2018). The "wholly groundless" doctrine merely enforces the contracting parties' presumed intent.[14]

b. These obvious presumptions are reinforced by traditional contract-law principles. See *First Options*, 514 U.S. at 944 (considering "ordinary state-law principles that govern the formation of contracts").

Implicit in every contract is the presumption of "good faith." See, *e.g.*, Restatement (Second) of Contracts § 205 (1981); 23 Williston on Contracts § 63:22 (4th ed.). Parties do not act in good faith by filing frivolous arbitration demands, and no contract implicitly authorizes baseless or abusive conduct. Under these rules, a contract delegating disputes over arbitrability is effectively delegating *bona fide* disputes over arbitrability. *Kubala*, 830 F.3d at 202 n.1. Such contracts cannot be permissibly read to endorse

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[14] The facts of *Douglas* illustrate the point. Douglas signed an arbitration agreement when opening a checking account with a bank. Years later, she was injured in a car crash and sued the driver; they settled, and Douglas's lawyer ultimately embezzled her funds using *the lawyer's own account*. When Douglas sued the bank for helping the lawyer, it sought to compel arbitration under the contract for her "completely unrelated" account, which, by happenstance, was at the same bank. See 757 F.3d at 461-463. The Fifth Circuit refused to credit this "untenable" argument: "Douglas would have to go to the arbitrator, who would flatly tell her that this claim is not within the scope of the completely unrelated arbitration agreement she signed many years earlier when opening a checking account and that she must actually go to federal court after all." *Id.* at 463. Looking to a realistic assessment of "intent," the court found that parties only "bind [themselves] to arbitrate gateway questions of arbitrability if the argument that the dispute falls within the scope of the agreement is not wholly groundless." *Id.* at 464.

bad-faith maneuvers designed solely to inject unnecessary expense and delay into a party's action. See 11 Williston on Contracts § 32:11 (4th ed.).[15]

c. In response, petitioners argue that if the contract *says* that arbitrability disputes must be arbitrated, then the parties must have "intend[ed] to send any and all claims of arbitrability—regardless of their merit—to arbitration." Br. 32. This lacks any grounding in reality. If parties agree to arbitrate arbitrability over widgets but not copyrights, the parties did not intend for the court to send a copyright case to arbitration and cost the parties needless time and money, all for the case predictably to start over in court after a wasteful round trip.[16]

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[15] The parties' agreement here is bound by North Carolina law, which follows these traditional contract-law principles. See, *e.g.*, *Maglione* v. *Aegis Family Health Ctrs.*, 607 S.E.2d 286, 291 (N.C. Ct. App. 2005) (endorsing "the basic principle of contract law that a party who enters into an enforceable contract is required to act in good faith").

[16] Petitioners insist there is a "particularly good reason" for the parties to wish to arbitrate *any* threshold determination, frivolous or otherwise: the agreement supposedly required any action to be filed in North Carolina; North Carolina courts apparently insist on using local counsel; an arbitration probably could be conducted without local counsel; and thus arbitrating even baseless arbitrability issues would save the cost of hiring local counsel. Br. 32-33. This argument fails on every conceivable level. Just a few: (i) a frivolous arbitration demand will not stay in arbitration for long, meaning the parties will eventually be stuck—wait for it—*hiring local counsel*; (ii) the cost of a pointless detour to a doomed arbitration assuredly exceeds the cost of local counsel; (iii) this action need *not* be filed in North Carolina, which is why it was filed in Texas—without any objection regarding jurisdiction or venue from any defendant; and (iv) there is no apparent evidence that any contracting party viewed the costs of local counsel as the driving force in deciding the arbitration clause's scope (for gateway issues or otherwise). If petitioners' argument proves anything, it is that they truly have no reason why respondent would agree to accept the pointless costs of a frivolous arbitration demand.

The FAA does not impose such an absolutist, wooden regime. Congress required courts to enforce the parties' "expectations" (*Stolt-Nielsen*, 559 U.S. at 682), which requires a real-world look into the parties' intent. It is not a task of mechanically reading contract language divorced from common sense. "If the argument that the claim at hand is within the scope of the arbitration agreement is 'wholly groundless,' surely [the parties] never intended that such arguments would see the light of day at an unnecessary and needlessly expensive gateway arbitration." *Ibid.*

Petitioners' contrary presumption flouts the parties' obvious expectations and thus the FAA's fundamental purpose. It undermines the parties' agreement and should be rejected.

2. The doctrine is consistent with traditional litigation norms, and nothing in the FAA requires courts to tolerate baseless filings

The "wholly groundless" doctrine also reflects background legal principles. Congress enacted the FAA to make "arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint*, 388 U.S. at 404 n.12. It thus enforces arbitration rights (*e.g.*, 9 U.S.C. 2) but does not exempt arbitration demands from general prohibitions against abusive and meritless filings. A "wholly groundless" arbitration claim "puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay." *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 398 (1990). Nothing in the FAA requires courts to endorse this bootless practice.

a. Petitioners' arguments are at odds with basic litigation norms. Those norms do not tolerate frivolous or abusive filings (cf. Fed. R. Civ. P. 11), and they certainly do not permit parties to enlist the judiciary as a tool for *compelling* meritless or inappropriate conduct.

An attempt to force a party to arbitrate where the arbitration clause indisputably does not apply fits squarely within these prohibitions. *Simply Wireless, Inc.* v. *T-Mobile US, Inc.*, 877 F.3d 522, 528-529 (4th Cir. 2017) (drawing parallel to Rule 11). It promotes the abusive tactics—and unnecessary delay and expense—that Rule 11 is designed to prevent. See *Cooter & Gell*, 496 U.S. at 397-398. There is no indication that Congress intended to exempt the FAA from the general rules applicable to all other litigation practice. See *Simply Wireless*, 877 F.3d at 529 (holding that "a district court need not, and should not, enforce a delegation provision when a party's assertion that a claim falls within an arbitration clause is frivolous or otherwise illegitimate").[17]

The "wholly groundless" exception respects the underlying purpose of the FAA without violating the core precepts that protect judicial integrity. If an arbitration demand is not remotely plausible, nothing in the FAA requires the judiciary to take part in the abusive scheme.

b. Nor is there any doubt about the upshot of petitioners' views. According to petitioners, a completely baseless arbitration demand must be sent to arbitration, even if it is unmistakably clear that the parties did not agree to arbitrate the dispute. See Pet. Br. 32. The U.S. Chamber, supporting petitioners, is even more forthcoming: it explicitly argues that Rule 11 cannot stop a frivolous arbi-

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[17] In related settings, courts refuse to tolerate frivolous arbitration-based appeals likewise designed to disrupt district-court proceedings. See, *e.g.*, *Britton* v. *Co-op Banking Grp.*, 916 F.2d 1405, 1412 (9th Cir. 1990) (refusing to allow defendant to stall trial by bringing a frivolous motion to compel arbitration); see also *Bradford-Scott Data Corp.* v. *Physician Comput. Network, Inc.*, 128 F.3d 504, 505-506 (7th Cir. 1997) (allowing case to proceed in district court pending a baseless appeal of an order refusing to compel arbitration).

tration demand, so long as the party has a legitimate argument that "the agreement delegates arbitrability" to the arbitrator. U.S. Chamber Amicus Br. 8-9 & n.3.

These contentions are extraordinary. A motion to compel arbitration cannot simply focus on the *delegation* provision; it must seek arbitration *of the case*. If the movant makes frivolous or bad-faith arguments about the arbitrability of the underlying claims, it is still abusing the judicial process, even if its predicate argument (about delegation) is sound. Moreover, if the movant is fully aware that its arbitrability claims are groundless, it is also aware that the arbitrator will simply send the case back—showing that the motion's entire purpose is impermissible cost, harassment, and delay.

The FAA was designed to put arbitration agreements on "equal footing" with other contracts. *Rent-A-Center*, 561 U.S. at 67. Refusing to compel arbitration where the arbitration claim is wholly groundless—*i.e.*, where the parties never genuinely thought an arbitrator would decide the dispute—"enforce[s] [the agreement] according to [its] terms." *Ibid.*; *Douglas*, 757 F.3d at 464. Nothing in law or logic requires courts and parties to tolerate (indeed, *promote*) the wasteful actions of parties filing frivolous arbitration demands. Petitioners' contrary contention is plainly wrong, and the judgment accordingly should be affirmed.

3. The doctrine promotes the strong federal policy in favor of quick and efficient dispute resolution

The "wholly groundless" doctrine is also consistent with the FAA's driving policy: advancing the "fair and expeditious" resolution of disputes. *Howsam*, 537 U.S. at 85.

a. Petitioners argue that the "wholly groundless" exception "effectively nullifi[ies]" the advantages of arbitration. Br. 33. This is exactly backwards. A frivolous dispute

over arbitrability benefits no one. It asks for a pointless detour for the arbitrator to confirm the inevitable. It *adds* cost and expense without corresponding savings. At best, it simply delays the case before it can return to court, where it obviously belongs. At worst, the arbitrator wrongly retains the case, and the award will ultimately be vacated after wasting months or years of time and resources.

Congress enacted a "liberal federal policy favoring arbitration," not a policy favoring *pointless* arbitration. *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011). The arbitration system does not benefit from forcing futile extra proceedings where the arbitrability demand is "wholly groundless."

Petitioners retort that arbitrators have tools for quickly rejecting meritless demands. Br. 35-36. But this ignores that *any* extra process is too much process; the quick return of the case to court may reduce the costs of petitioners' position, but *some* cost still exists.

And while some arbitration rules *permit* arbitrators to decide arbitrability in "preliminary" hearings (Pet. Br. 35), they do not *require* it. See, *e.g.*, AAA Commercial Rules R-7(c) ("The arbitrator may rule on [objections to jurisdiction] as a preliminary matter *or as part of the final award.*") (emphasis added). That leaves open the distinct possibility that parties will incur the time and expense of a full arbitration before being told that the claim should have been in court all along. Courts, by contrast, are obligated to resolve the arbitrability question at the outset. *E.g.*, *Reyna* v. *Int'l Bank of Commerce*, 839 F.3d 373, 378 (5th Cir. 2016).

Nor does the promise of possible compensation cure the problem. Contra Pet. Br. 36. Even if arbitrators theoretically have the power to "sanction[] * * * bad-faith con-

duct" with fee- and cost-shifting (*ibid.*), it is far more efficient not to incur pointless fees and costs *in the first place*. Petitioners may be correct that there are ways to make its position more palatable, but it still interferes with the goals of arbitration. See *Stolt-Nielsen*, 559 U.S. at 685 (promising "lower costs" and "greater efficiency and speed").

b. The "wholly groundless" exception, by contrast, fulfills the FAA's objectives. It is quick and easy. It "look[s] only to whether there is a *bona fide* dispute on arbitrability," and does not require (or even permit) courts to "*resolve* the parties' arbitrability arguments." *Kubala*, 830 F.3d at 202 n.1; accord *Qualcomm*, 486 F.3d at 1374. Once a court identifies a "'plausible' argument," the inquiry is over. *Kubala*, 830 F.3d at 202 n.1.

This means that nonmovants with only a "colorable" objection (Pet. Br. 33) will always, and immediately, lose. The doctrine is reserved for the rare situation of truly implausible arguments. When that situation exists, it permits courts to cut off the futile attempt at the pass, avoiding a useless roundtrip before the case is eventually tried in court. That preserves the efficiencies and integrity of the system without doing any harm to the parties' agreement.[18]

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[18] Petitioners are wrong that parties resisting arbitration will find this doctrine "irresistible," setting up protracted "mini-trials" and even appeals. Br. 33. For one, the "wholly groundless" doctrine sets an astoundingly high bar, which is why "[s]uch cases are exceptional." *Kubala*, 830 F.3d at 202 n1. It does not take much for the average movant to identify a *plausible* argument. *Qualcomm*, 466 F.3d at 1374. For another, the party opposing arbitration is typically *the plaintiff*. Plaintiffs do not seek out ways to waste their own time and money and delay their own case with baseless procedures and appeals. The actual concern—looking to the real world—is that parties (under petitioners' rule) would assert groundless arbitration claims

Nor does the doctrine present any serious risk of undermining arbitration. Few, if any, arbitration demands declared utterly implausible and meritless by a court will be declared *correct* by an arbitrator. So even if a court errs in declaring a claim "*wholly* groundless" (because it is actually just "ordinary" groundless), there is little chance it would have persuaded an arbitrator in any event. The doctrine thus spares waste and inefficiency without any realistic cost. It is fully consistent with the FAA's animating interests.

C. The FAA's History Reinforces The "Wholly Groundless" Exception As A Longstanding Check On Baseless Arbitration Demands

The FAA's history further supports the "wholly groundless" exception. At the time of the FAA's enactment, Congress was aware of the need for judicial review of arbitration demands, and it understood the role that Section 4 played in fulfilling that obligation. Nor has that limited role proved problematic: Courts have been applying the "wholly groundless" doctrine for decades, and there is no hint it has frustrated the effective arbitration of disputes.

1. a. Even where parties agree to arbitrate arbitrability, the FAA's history reveals that Congress still intended courts to play a substantive role in the process.

During congressional hearings on the FAA, for example, Senator Walsh expressed concern that a person would be forced to arbitrate against his will, having "surrender[ed] his right to have his case tried by the court" even though "a great many of these contracts that are entered into are really not voluntarily [sic] things at all." *Sales and Contracts to Sell in Interstate and Foreign Commerce,*

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to force a detour to arbitration, driving up litigation costs and generating unwarranted delays.

and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before the Subcomm. of the S. Comm. on the Judiciary, 67th Cong. 2 (1923) (Sen. Walsh).

To overcome that objection, the FAA's proponents—including Julius Henry Cohen, its principal drafter—emphasized the role that Sections 3 and 4 gave to courts. Specifically, they pointed out that "the party who has refused to arbitrate because he believes in good faith * * * that the agreement is not applicable to the controversy, is protected by the provision of the law which requires the court to examine into the merits of such a claim." *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 33-35 (1924) (statement of Julius Henry Cohen); see also Julius Henry Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 Yale L.J. 147, 149 (1921) (discussing the New York arbitration law—on which the FAA was modeled—and explaining that "if there be any dispute regarding the making of the contract * * *, a trial of that issue by the court * * * is preserved").

Congress relied on the understanding, then, that courts would play a protective role in ensuring that parties would not be forced to arbitrate unexpectedly. The "wholly groundless" doctrine is cut from this same cloth.

b. Congress also had a body of case law to serve as a reference. The FAA was eventually modeled on New York's state arbitration law.[19] In interpreting that law,

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[19] *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before the Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 2 (1923) (statement of Charles L. Bernheimer) ("This bill follows the lines of the New York arbitration law, applying it to the fields wherein there is Federal Jurisdiction."); S. Rep. No. 68-536, at 3

New York courts adopted a form of the "wholly groundless" exception. Indeed, as early as 1924, the Court of Appeals of New York reasoned that "[u]nquestionably a claim may be so unconscionable or a defense so frivolous as to justify the court in refusing to order the parties to proceed to arbitration." *S.A. Wenger & Co.* v. *Propper Silk Hosiery Mills, Inc.*, 146 N.E. 203, 204 (N.Y. 1924). Congress thus enacted the FAA against the backdrop of rare situations where arbitration is properly refused because the demand was patently meritless.

2. Courts have now long applied the "wholly groundless" doctrine without any noted interference with arbitration rights. For over half a century, courts and treatises—both federal and state—have recognized that there is no obligation to order arbitration where "it is clear that the claim of arbitrability is wholly groundless." *McCarroll*, 315 P.2d at 333; see also *United Elec., Etc., Workers* v. *General Elec. Co.*, 233 F.2d 85, 101 (1st Cir. 1956) ("If * * * the applicant's claim of arbitrability is not frivolous or patently baseless, an order can be given, with the decision on arbitrability to be made in the arbitration proceedings that follow, subject of course to §§ 10-11 of the Act."); *Am. Stores Co.* v. *Johnston*, 171 F. Supp. 275, 277 (S.D.N.Y. 1959) ("When it appears that a claim of arbitrability is frivolous or patently baseless it would be an abuse of the arbitration process and would defeat the contractual intent of the parties to compel arbitration."); *Local No. 358, Bakery & Confectionery Workers Union* v. *Nolde Bros., Inc.*, 530 F.2d 548, 553 (4th Cir. 1975) (requiring courts to give effect to a delegation provision "unless it is clear that the claim of arbitrability is wholly

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(1924) ("The bill, while relating to maritime transactions and to contracts in interstate and foreign commerce, follows the lines of the New York arbitration law enacted in 1920, amended in 1921 * * *.").

groundless") (quoting 48 Am. Jur. 2d *Labor and Labor Relations* § 1257).

And more recently, multiple circuits have expressly endorsed the doctrine. See *Douglas*, 757 F.3d at 463-464; *Turi*, 633 F.3d at 507, 511; *Qualcomm*, 466 F.3d at 1370-1371, 1374. These cases alone extend back over a decade, and petitioners have not even tried to establish that parties in those jurisdictions have been hampered, much less that arbitration has suddenly ground to a halt.

History and experience thus confirm that the "wholly groundless" exception has traditionally served as a useful check in rare cases. Petitioners have failed to offer any compelling excuse for jettisoning this established doctrine.

II. PETITIONERS' CONTRARY POSITION DISTORTS KEY ASPECTS OF THE DOCTRINE AND FACTUAL COMPONENTS OF THIS CASE

Petitioners' remaining attempts to undermine the "wholly groundless" doctrine are meritless.

A. Contrary to petitioners' contention (Br. 37), the "wholly groundless" doctrine is not anti-arbitration; it is anti-*litigation-abuse*. The exception is not premised on the idea that arbitrators will fail to get it right. It is premised on the idea that the arbitration demand is so meritless that *no one* could possibly get it wrong, and thus it is useless to tolerate the cost and delay of a needless detour.

This accordingly is not "a return to the bad old days of 'judicial hostility to arbitration.'" Pet. Br. 37. On the contrary, the courts applying the exception have stressed, emphatically, the need to respect "the province of the arbitrator" (*Qualcomm*, 466 F.3d at 1374), and have underscored that the rule "is not a license for the court to prejudge arbitrability disputes" (*Kubala*, 830 F.3d at 202 n.1). It simply enforces the parties' obvious expectations,

which is what the FAA was designed to do. *Stolt-Nielsen*, 559 U.S. at 682.

B. Contrary to petitioners' contention, this "narrow escape valve" (Pet. App. 11a) is not prone to mischief or abuse. Any party seeking arbitration need only show it has a *plausible* basis for its claim; the standard is thus limited to the rare case that flunks the lowest bar of review. See Pet. App. 5a (stating that arbitration demands will be "granted in almost all cases"). Just as there is every reason to believe arbitrators will act in good faith, there is also every reason to believe lower courts will faithfully apply this "limited" exception. *Douglas*, 757 F.3d at 463.

Petitioners nonetheless decry that the doctrine will burden the system (Br. 33-35), but their concerns are overblown. This doctrine has been endorsed for decades, and there is no evidence that courts have frustrated legitimate arbitration demands. Indeed, quite the contrary: respondent has identified only *four* other cases in which an appellate court invoked the "wholly groundless" exception to reject arbitration. *Douglas*, 757 F.3d at 464; *Turi*, 633 F.3d at 511; *Interdigital Commc'ns, LLC* v. *ITC*, 718 F.3d 1336 (Fed. Cir. 2013), vacated on other grounds, 134 S. Ct. 1876 (2014); *Evans* v. *Bldg. Materials Corp.*, 858 F.3d 1377, 1380 & n.1 (Fed. Cir. 2017) (accepting the "wholly groundless" standard for purposes of the appeal because any contrary argument was waived). This is hardly compelling evidence that the sky is falling.[20]

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[20] The doctrine's use in district court is also extraordinarily rare. A Lexis search of district-court opinions (looking for "wholly groundless" and "arbitration") produced only 96 results, dating from 1991 to 2018. Moreover, in only 8 of those 96 cases did the court declare an arbitrability argument "wholly groundless." This paucity of cases disproves petitioners' speculation that the doctrine is unmanageable or abused in practice.

C. In multiple respects, petitioners misstate the factual backdrop of this case.

First, petitioners wrongly imply they won an issue they actually lost. The courts below did *not* find that respondent "[a]gree[d] to arbitrate questions of arbitrability." Pet. Br. 32; see also *id.* at 22, 34. Not a single Article III judge reviewing the contract's "unique" language (Pet. App. 28a) believed the parties delegated the threshold question; the magistrate judge alone disagreed, but did so by rejecting the clause's plain language in favor of the judge's own view of what the contract *ought* to say. See, *e.g.*, Br. in Opp. 20-24. The district court rejected petitioners' argument outright (Pet. App. 32a-34a), and the shoe was poised to drop again in the Fifth Circuit.

In order to prevail on this question, petitioners must identify clear and unmistakable evidence supporting their position. Below, the Fifth Circuit did not suggest that petitioners were right (contra Pet. Br. 10 n.1) or even that the question was somewhat close; it instead identified "strong" reasons that petitioners were wrong. Pet. App. 10a. Far from a "clear and unmistakable" showing, petitioners failed to establish their position was even debatably correct.

The proper resolution of this question involves a close reading of this particular arbitration clause, against background rules of North Carolina contract law and the parties' specific intent (at least with respect to the single petitioner-signatory who bargained for arbitration). See Br. in Opp. 20-24. Those issues fall outside the question presented, and the Fifth Circuit can decide them, if necessary, on remand. But suffice it to say that petitioners are

incorrect to suggest the agreement delegated arbitrability when the proceedings below held it did not.[21]

Second, petitioners attribute the "years-long dispute" in this case to the "wholly groundless" doctrine. Pet. Br. 15. This is false. As previously explained (Br. in Opp. 7 n.6), the extended delay was the result of a procedural snafu where the case was apparently lost in the district court's docket. The parties were not engaged in active litigation for all "six years" (Pet. Br. 34), and it is misleading to suggest otherwise.

Petitioners further ignore that the "wholly groundless" exception was not the only source of litigation. Parties asserting "wholly groundless" arbitration demands are usually litigating aggressively, and this case proves the point: (i) only one petitioner had an actual arbitration agreement with respondent, yet all petitioners tried to take advantage of that third-party agreement; (ii) the language of the arbitration clause was suspect at best, as the district court held (and the Fifth Circuit all but held); (iii) petitioners tried to force the arbitrability determination itself into arbitration; and (iv) petitioners, of course,

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[21] Petitioners argue that the contract's "carve-out for injunctive relief" is "routinely understood" to provide temporary relief pre-arbitration or permanent relief post-arbitration. Pet. Br. 8. Those odd limitations appear nowhere in the agreement's text. If that is what the parties intended, petitioners (one of whom drafted the agreement) easily could have drafted it that way. Instead, as the court of appeals found, the arbitration provision is "clear on its face"—it categorically exempts "action[s] seeking injunctive relief." Pet. App. 12a-13a. Any contrary reading has "no footing within the four corners of the contract." *Id.* at 16a. Petitioners may regret inserting this limitation into the agreement, but the task is to "interpret and enforce a contract," not to rewrite the policy according to one's "own brand of industrial justice." *Stolt-Nielsen*, 559 U.S. at 671-672 (internal quotation marks omitted).

premised their entire arbitration demand on a "wholly groundless" argument.

Petitioners' effort to avoid respondent's day in court generated extensive litigation—and would have generated extensive litigation even *without* the "wholly groundless" doctrine. That doctrine prevented additional and fruitless expense and delay; it was not its source.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 17-1272

In the Supreme Court of the United States

HENRY SCHEIN, INC., ET AL., PETITIONERS

v.

ARCHER AND WHITE SALES, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Two well-established principles of the Court's Arbitration Act jurisprudence resolve this case in petitioners' favor. First, courts are required to enforce arbitration agreements according to their terms—including provisions delegating gateway issues of arbitrability to the arbitrator. Second, where an issue is properly submitted to the arbitrator, a court has no reserved power to decide the issue for itself. The court of appeals erred when it ignored those principles, holding instead that a court could decide a gateway issue of arbitrability for itself, despite a delegation to the arbitrator, if it deemed the claim of arbitrability "wholly groundless."

Respondent does remarkably little to dispute those principles. Instead, respondent offers the same strained

arguments about the text of the Arbitration Act that petitioners have already addressed in their opening brief. Respondent is unable to articulate a colorable statutory basis for the "wholly groundless" exception, confirming that respondent's true complaint lies with Congress.

Confronted with the obvious difficulties in its textual arguments, respondent quickly resorts to policy considerations. Indeed, large swaths of respondent's brief read like a white paper advocating a new and improved arbitration regime. But even assuming respondent's preferred position would make for better policy, that is irrelevant here. This case involves a statute, one the Court has construed many times to require the rigorous enforcement of arbitration agreements according to their terms. The Court "cannot rely on * * * judicial policy concern[s]" to refuse to honor the parties' agreement to delegate arbitrability to the arbitrator. *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 270 (2009).

In any event, respondent's policy arguments lack merit. As this Court has repeatedly recognized, Congress, through the Arbitration Act, expressed a clear federal policy in favor of arbitration. But the "wholly groundless" exception acts as a roadblock to the efficient, inexpensive dispute resolution Congress intended to promote. Nor can respondent's position be justified by resort to the Arbitration Act's history.

In short, the "wholly groundless" exception fails to honor the bedrock requirement that arbitration agreements be enforced according to their terms. The court of appeals' adoption of that exception was erroneous, and its judgment should be vacated.

A. The Arbitration Act Does Not Permit A Court To Decide For Itself The Issue Of Arbitrability If The Parties Have Delegated That Issue To The Arbitrator

As petitioners have explained, this Court has long recognized that parties may agree to arbitrate "gateway" issues of arbitrability in addition to the merits of their underlying dispute. See *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 67 (2010); *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 944 (1995). "An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement," and the Arbitration Act "operates on this additional arbitration agreement just as it does on any other." *Rent-A-Center*, 561 U.S. at 70. In addition, when an issue is properly submitted to an arbitrator, a court may not arrogate unto itself the power to decide that issue. See *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U.S. 643, 649-650 (1986).

This Court's precedents thus dictate an inexorable conclusion: when parties clearly and unmistakably agree to delegate the authority to decide arbitrability to the arbitrator, a court may not decide arbitrability for itself. Given the clarity of those precedents, it is unsurprising that the courts of appeals to have most thoroughly analyzed the question presented have concluded that there is no valid basis for the "wholly groundless" exception. See *Jones* v. *Waffle House, Inc.*, 866 F.3d 1257, 1269-1270 (11th Cir. 2017); *Belnap* v. *Iasis Healthcare*, 844 F.3d 1272, 1286-1287 (10th Cir. 2017); see also *Douglas* v. *Regions Bank*, 757 F.3d 460, 468 (5th Cir. 2014) (Dennis, J., dissenting).

Respondent wisely does not dispute the principles established by this Court's precedents. Respondent accepts that an agreement to delegate the authority to decide arbitrability to an arbitrator is enforceable, provided the delegation is made with the requisite clarity. See Br. 6-7.

Respondent further admits (if begrudgingly) that an "antecedent agreement" to arbitrate gateway issues of arbitrability can be conceived as a "separate agreement" from the agreement to arbitrate the merits of the underlying dispute. Br. 18. And respondent agrees that, where claims are subject to arbitration, "courts are required to compel arbitration 'whether the claims of the party seeking arbitration are "arguable" or not, indeed even if it appears to the court to be frivolous.'" Br. 17 (quoting *AT&T Technologies*, 475 U.S. at 649-650). As a result, this Court's precedents preclude a court from refusing to enforce an agreement delegating the authority to decide arbitrability to the arbitrator simply because the court believes the claim of arbitrability is "wholly groundless."

In the face of those points, all respondent can say is that the foregoing conclusion is "specious" because an antecedent agreement to arbitrate arbitrability "does not exist in a vacuum." Br. 18. "If there is no plausible argument that the case actually belongs in arbitration," respondent continues, "the delegation issue becomes academic." *Ibid.* In so arguing, however, respondent is asking this Court effectively to ignore its reasoning in *Rent-A-Center* that "[a]n agreement to arbitrate a gateway issue is simply an additional, antecedent agreement" and that the Arbitration Act "operates on this additional arbitration agreement just as it does on any other." 561 U.S. at 70. Notably, respondent does not seek to revisit the reasoning of *Rent-A-Center*, much less offer any basis for the Court to do so.

Respondent further contends (Br. 18) that a party cannot invoke an antecedent agreement to arbitrate arbitrability while conceding that the underlying claims are not arbitrable. That is true, but it adds nothing: a delegation agreement comes into play only when one of the parties disputes the arbitrability of the underlying claims. Put

another way, if the party invoking the delegation agreement concedes that the underlying claims are not arbitrable, there is no arbitrability dispute for the arbitrator to resolve. But when such a dispute arises, *someone* will need to resolve the issue of arbitrability. This Court's decisions interpreting the Arbitration Act do not permit a court to ignore the parties' agreement to delegate the authority to decide the issue to an arbitrator, and instead decide that issue for itself.

B. There Is No Valid Basis For A 'Wholly Groundless' Exception To The Enforcement Of An Agreement Delegating The Authority To Decide Arbitrability To An Arbitrator

1. The 'Wholly Groundless' Exception Has No Basis In The Text Of The Arbitration Act

In attempting to root the "wholly groundless" exception in the text of the Arbitration Act, respondent puts all of its eggs in one basket. According to respondent, a court "cannot be 'satisfied' of a 'failure to comply'" with an arbitration agreement, authorizing the issuance of an order compelling arbitration under Section 4, when "a party's arbitration demand is frivolous." Br. 17-18 (quoting 9 U.S.C. 4). Petitioners addressed that very argument in detail in their opening brief. See Pet. Br. 24-27. Respondent mostly rehashes points that petitioners have already rebutted, and its few additional points are unconvincing.

a. As petitioners demonstrated in their opening brief, the plain text of Section 4 belies respondent's interpretation. Section 4 requires a court to compel arbitration if it is "satisfied that the making of the agreement for ar-

bitration or the failure to comply therewith is not in issue." 9 U.S.C. 4.[1] As this Court has explained, a court "may consider only issues relating to the *making* and *performance* of the agreement to arbitrate" in determining whether to compel arbitration under Section 4. *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 404 (1967) (emphasis added).

The "wholly groundless" exception plainly has nothing to do with the "making" or "performance" of the relevant agreement here—the only things of which a court must be "satisfied" before compelling arbitration under Section 4. As discussed in petitioners' opening brief, the "making" of the agreement concerns contract formation: did the parties enter a valid and binding agreement? And the "performance" of the agreement concerns the nonmoving party's compliance with the agreement: did the party "fail[] to comply" with the agreement by resisting arbitration, so as to require an order compelling arbitration from the court? See Pet. Br. 25. The "wholly groundless" exception relates not to the "making" or the "performance" of the agreement to delegate arbitrability to the arbitrator, but rather to the *merits* of the issue of arbitrability.

Respondent argues that Section 4's focus on the "making" and "performance" of the agreement "proves [its] point." Br. 19. According to respondent, the parties

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[1] At numerous points, respondent suggests that "[t]he failure to comply is the failure to arbitrate under the part[ies'] agreement." Br. 16; see, *e.g.*, Br. 17 (stating that "petitioners cannot explain how a party 'fail[ed] to comply' simply because it filed a claim in court *that belongs in court*"); Br. 20 (stating that "[a] party does not fail to 'perform' by filing a lawsuit that is in fact *not* subject to arbitration"). But that proves far too much: if a court were required to "satisfy" itself that the parties were required to arbitrate the underlying claims before granting a motion to compel arbitration, a delegation of arbitrability would have no effect whatsoever.

would not have "made an agreement to subject themselves" to "wholly groundless" demands for arbitration, and "[a] party does not fail to 'perform'" under an arbitration agreement by filing a lawsuit if the argument in favor of arbitrability is "wholly groundless." *Ibid.*

That argument is too clever by half. The question whether the parties *made* an agreement delegating arbitrability to an arbitrator—in other words, whether a valid and binding delegation agreement exists—is independent from the question whether the underlying dispute is arbitrable. And of course a party fails to *perform* under an agreement delegating arbitrability to an arbitrator by challenging arbitrability in court. Respondent can argue to the contrary only by once again ignoring the principle that "[a]n agreement to arbitrate a gateway issue is simply an additional, antecedent agreement" that the Arbitration Act "operates on * * * just as it does on any other." *Rent-A-Center*, 561 U.S. at 70.

b. At the certiorari stage, respondent suggested that Section 4 offered an alternative textual basis for the "wholly groundless" exception: when a party "files a claim in court that belongs in court," the opposing party cannot be "aggrieved" for purposes of Section 4, because "there is no cognizable prejudice" from bypassing arbitration. Br. in Opp. 25 (emphasis omitted). But respondent now retreats from that argument, conceding that the term "aggrieved" cannot "do the work by itself." Br. 17 n.11.

Respondent instead contends only that the term "aggrieved" "reinforces" its interpretation of Section 4. See Br. 17 n.11. It does not even do that. In the Arbitration Act, Congress protected a party's right to proceed in arbitration according to the terms of a valid arbitration agreement. A party is thus "aggrieved" for purposes of Section 4 as soon as a counterparty refuses to arbitrate

under the terms of the parties' valid arbitration agreement. See Pet. Br. 26-27 (citing cases). When a party fails to comply with an antecedent agreement to arbitrate arbitrability, it leaves the other party "aggrieved" and permits it to seek an order compelling arbitration under Section 4.

c. Respondent also suggests (Br. 20-22) that Section 10(a)(4) of the Arbitration Act supports its reading of Section 4. Respondent's argument proceeds as follows. Under Section 10(a)(4), a court can vacate an arbitration award if an arbitrator "exceeded [his] powers." "If an arbitration demand is 'wholly groundless,'" respondent contends, "then the arbitrator[] necessarily will have exceeded [his] powers by proceeding with the arbitration." Br. 20. And "if courts have the power (under Section 10(a)(4)) to vacate awards" on the "back end," respondent continues, "then surely courts have the power (under Section 4) to make the same determination" on the "front end." Br. 22.

That argument breaks down at each step. To begin with, when a party argues that an arbitrator "exceeded [his] powers" under an antecedent agreement to arbitrate arbitrability, the party is challenging the arbitrator's decision on the merits of the issue arbitrated under that agreement: namely, the issue of arbitrability. But Section 10(a)(4) does not permit a court to second-guess the merits of an arbitrator's interpretation of the arbitration agreement (or any other legal ruling); it is well established that "the interpretations of the law by the arbitrators * * * are not subject, in the federal courts, to judicial review for error in interpretation." *Wilko* v. *Swan*, 346 U.S. 427, 436-437 (1953), overruled on other grounds, *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

Indeed, it is hard to see how an arbitrator could "exceed[] [his] powers" under Section 10(a)(4) by deciding an issue that the parties expressly empowered him to decide. Section 10(a)(4) permits a court to overturn an arbitral award "[o]nly if the arbitrator acts outside the scope of his contractually delegated authority—issuing an award that simply reflects his own notions of economic justice rather than drawing its essence from the contract." *Oxford Health Plans LLC* v. *Sutter*, 569 U.S. 564, 569 (2013) (alterations, internal quotation marks, and citations omitted). But if the parties have in fact delegated the issue of arbitrability, the arbitrator will be acting within the scope of his authority however he decides that issue. For that reason, in the analogous context of proceedings to enforce arbitral awards under the New York Convention, courts have held that "[t]here [is] no need for [a court] to independently determine that [a dispute is arbitrable] once it ha[s] concluded that the parties had delegated this task to the arbitrator." *Chevron Corp.* v. *Republic of Ecuador*, 795 F.3d 200, 208 (D.C. Cir. 2015); see *Schneider* v. *Kingdom of Thailand*, 688 F.3d 68, 74 (2d Cir. 2012).

To be sure, there may be some post-award judicial review under Section 10 for errors of an egregious nature. While this Court has not squarely addressed the issue, some courts of appeals have held that Section 10 permits a court to deny enforcement of an arbitral award that is in "manifest disregard" of the law. *Stolt-Nielsen S.A.* v. *AnimalFeeds International Corp.*, 559 U.S. 662, 672 n.3 (2010); see *Hall Street Associates, L.L.C.* v. *Mattel, Inc.*, 552 U.S. 576, 584-585 (2008). It does not follow from any such limited "back end" review, however, that a court can simply short-circuit arbitral decisionmaking on the "front end." An arbitrator would surely act in "manifest disregard" of the law by ruling in favor of a party with a truly frivolous claim on the merits of an underlying dispute.

See, *e.g.*, *Collins* v. *D.R. Horton, Inc.*, 505 F.3d 874, 879 (9th Cir. 2007); *Dominion Video Satellite, Inc.* v. *Echostar Satellite L.L.C.*, 430 F.3d 1269, 1275 (10th Cir. 2005); *Marshall* v. *Green Giant Co.*, 942 F.2d 539, 550 (8th Cir. 1991). But this Court has made clear that, "even if it appears to the court to be frivolous," a court "ha[s] no business weighing the merits of [a] grievance" that the parties have agreed to arbitrate before sending the grievance to the arbitrator. *AT&T Technologies*, 475 U.S. at 649-650.

It makes perfect sense that the Arbitration Act would provide for greater judicial review on the "back end," after arbitral decisionmaking, than on the "front end." Congress enacted the Arbitration Act to "reverse the longstanding judicial hostility to arbitration agreements," *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991), under which courts would refuse to require parties to arbitrate issues they had agreed to arbitrate. See *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 510-511 & n.4 (1974). Congress thus sought to limit the discretion of courts to allow parties to bypass arbitration altogether. See H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2 (1924); Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265, 269-270 (1926) (Cohen & Dayton). Accordingly, Congress established a regime under which courts had limited authority to refuse to enforce arbitration agreements, see 9 U.S.C. 2, and instead were required to compel arbitration whenever an arbitration agreement was valid and one party was refusing to comply, see 9 U.S.C. 4.

Congress could reasonably have been less concerned about judicial hostility to arbitration on the "back end": that is, after the parties had completed arbitration and obtained a decision. Indeed, Congress appears to have enacted the Arbitration Act's post-arbitration enforcement

mechanisms not to preempt judicial hostility to arbitration, but rather merely to "simplif[y]" the "procedure to enforce" the arbitrator's decision. Cohen & Dayton 270-272. An interpretation of the Arbitration Act that provides for a more limited judicial role on the "front end" than the "back end" thus aligns with Congress's objectives. Whatever the scope of judicial review of an arbitrator's decision on arbitrability under Section 10(a)(4), therefore, that provision offers no basis for a court preemptively to decide arbitrability for itself in the face of a valid delegation.

2. The 'Wholly Groundless' Exception Betrays The Federal Policy In Favor Of Arbitration And Disregards The Contracting Parties' Intent

Respondent argues that the "wholly groundless" exception is consistent with the pro-arbitration policy the Arbitration Act embodies. See Br. 23-32. Respondent's heavy reliance on policy considerations simply underscores the weakness of its textual arguments. Even taken on their own terms, however, respondent's policy arguments are unavailing.

a. Over and over again, respondent assures the Court that the "wholly groundless" exception does not apply to claims of arbitrability that are "genuine," "plausible," "legitimate," or "bona fide." Br. 12, 14, 16. But those assurances simply raise the question: who decides whether a claim is "genuine" or "legitimate"? This Court's precedents provide the answer: "the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter." *First Options*, 514 U.S. at 943. Where, as here, the parties include a delegation provision in their agreement, they vest the power to decide arbitrability in the arbitrator. It is the arbitrator then, who decides whether a claim of arbitrability is "genuine" or "legitimate." For a court to intercede and decide

that question for itself is to ignore the parties' contractual intent and the clear command of the Arbitration Act. See 9 U.S.C. 3-4.

Respondent contends that "the 'wholly groundless' test simply honors the parties' intent," because "[n]o contract grants a right to assert implausible claims." Br. 23. (internal quotation marks and citation omitted). "[T]here is no conceivable meeting of the minds," respondent continues, that would allow one party to make a claim of arbitrability the other party thinks is "groundless." Br. 24. Again, respondent misses the mark. The meeting of the minds here is simply the agreement as to who decides the claim of arbitrability. The parties' intent—manifested in the delegation provision—is to let an arbitrator decide whether a claim is subject to arbitration; there is no implied term carving out from the delegation provision cases in which one party thinks the claim of arbitrability is "wholly groundless."

When the parties have assigned the power to decide arbitrability to an arbitrator, a court must focus only on that antecedent agreement—and enforce it according to its terms. See *Rent-A-Center*, 561 U.S. at 70-72. The "wholly groundless" exception allows a court to claim that power for itself, contrary to the requirement that a court "give effect to the contractual rights and expectations of the parties." *Stolt-Nielsen*, 559 U.S. at 682 (internal quotation marks and citation omitted).

b. Respondent further contends that the "wholly groundless" exception protects against "bad-faith maneuvers designed solely to inject unnecessary expense and delay into a party's action." Br. 26. But the facts of this case belie the notion that the "wholly groundless" exception applies only to "baseless or illegitimate" claims of arbitrability. Br. 16.

At the very beginning of this case, the magistrate judge *granted* petitioners' motions to compel arbitration. See Pet. App. 39a-44a. Far from seeking arbitration in bad faith, petitioners relied on the widely accepted understanding that carve-outs for injunctive relief in arbitration provisions merely permit relief from a court either on a preliminary basis to preserve the status quo *before or during* arbitration of the underlying claims, or on a permanent basis *after* the plaintiff secures an arbitral award in its favor. See Pet. Br. 8-9 (citing cases). The magistrate judge agreed, but later courts deployed the "wholly groundless" exception to reverse his ruling.

This case illustrates, therefore, that the "wholly groundless" exception does not apply only in "the rarest of cases [in which] *any* legitimate argument defeats its application," as respondent contends. Br. 2. Instead, it provides license for courts to wield the age-old "judicial hostility to arbitration" even in the face of plausible (and in fact correct) arguments that the dispute does not belong in court. *Green Tree Financial Corp.-Alabama* v. *Randolph*, 531 U.S. 79, 89 (2000) (citation omitted).[2]

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[2] In theory if not in practice, parties could choose to craft an arbitration provision that divides responsibility for arbitrability between the arbitrator and the court (like respondent's hypothetical parties that agree to arbitrate arbitrability over widgets but not copyrights, see Br. 26). Relying on the carve-out for injunctive relief, respondent contends that the parties either divided responsibility for arbitrability or did not delegate responsibility to the arbitrator at all. See Br. 37-38. But that contention plainly lacks merit: the carve-out here was unambiguously a ***substantive*** carve-out (concerning the scope of *arbitration*), not a carve-out ***from the delegation*** (concerning the scope of ***arbitrability***). Put another way, the applicability of the carve-out is the very arbitrability question that, in petitioners' view, the arbitrator should have been permitted to decide: namely, "whether [the parties'] agreement cover[ed] [the] particular controversy" at issue.

More generally, where a party pursues a frivolous claim of arbitrability, the legal system already has safeguards to protect against such "bad-faith maneuvers." Respondent concedes both that arbitrators are empowered to decide arbitrability at the threshold—as they would presumably do if a claim of arbitrability were truly meritless—and that they can sanction bad-faith conduct with fee and cost shifting. See Br. 30-31.

What is more, that is far from the only remedy for frivolous or harassing claims. All lawyers have a professional obligation not to bring frivolous proceedings. See American Bar Association, Model Rules of Professional Conduct R. 3.1. And the federal civil rules require certification that any submission to a court "is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation." Fed. R. Civ. P. 11(b)(1). There is therefore no valid justification to fashion a substantive exception to the delegated authority of an arbitrator to decide gateway issues of arbitrability.

c. Respondent next attempts to justify the "wholly groundless" exception as consistent with the "strong federal policy in favor of quick and efficient dispute resolution." Br. 29. Again, the facts of this case undercut that argument.

It would be eminently reasonable for parties to believe that, regardless of the outcome, any disputes about arbi-

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Rent-A-Center, 561 U.S. at 69; see, *e.g.*, *Crawford Professional Drugs, Inc.* v. *CVS Caremark Corp.*, 748 F.3d 249, 262-263 (5th Cir. 2014); *Oracle America, Inc.* v. *Myriad Group A.G.*, 724 F.3d 1069, 1075-1076 (9th Cir. 2013). In light of the court of appeals' confusing discussion of this issue in its earlier opinion, see Pet. App. 6a-11a, the Court may wish to provide guidance on the issue for the court of appeals on remand.

trability could be resolved more efficiently by an arbitrator than by a court. The central benefits of arbitration, after all, are the "expeditious results" and the "reduc[ed] * * * cost" of dispute resolution. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985); *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 345 (2011). Because of the "wholly groundless" exception, however, the parties in this case were forced to detour into federal court and engage in preliminary (and potentially non-dispositive) motions practice about arbitrability that has now dragged on for six years—longer, surely, than it would have taken to resolve the underlying claims in arbitration. See J.A. 23-48. And in the interim, petitioners have had to endure years of costly discovery, as well as other motions practice and attendant costs of litigation in federal court.

Respondent complains that the "extended delay was the result of a procedural snafu where the case was apparently lost in the district court's docket," and not the result of the "wholly groundless" exception. Br. 38. But that only proves petitioners' point: if the issue of arbitrability had been properly referred to the arbitrator in the first place, there would have been no such delay from multiple rounds of judicial review.

d. Respondent fails to grapple with the fact that all of its policy arguments apply with equal force to meritless *substantive* claims as they do to meritless claims of arbitrability. For example, when arbitrability is not in dispute and a party insists on arbitrating substantive claims that are surefire losers, it would certainly be more "efficient" to have a court say so at the outset. After all, frivolous claims subject the opposing party to wasteful expense and delay, and such a party presumably would not willingly agree to subject itself to abusive legal process. Yet this Court has squarely rejected such reasoning, holding that

a court "is not to rule on the potential merits of the underlying claims * * * even if [they] appear[] to the court to be frivolous." *AT&T Technologies*, 475 U.S. at 649-650. So too with a claim of arbitrability: there, too, a district court "ha[s] no business" looking at the merits of the claim. *Id.* at 650 (citation omitted).

e. Respondent further contends (Br. 29) that the "wholly groundless" exception is necessary to prevent parties from being compelled to arbitrate the merits of the underlying dispute if they did not agree to do so. But where the parties delegate authority to an arbitrator to decide whether the dispute is arbitrable, courts must presume that the arbitrator is "competent, conscientious, and impartial." *Mitsubishi Motors*, 473 U.S. at 634. The risk that a competent arbitrator will nevertheless arbitrate claims plainly outside the scope of the parties' agreement is exceedingly low.

The real risk if this Court were to endorse the "wholly groundless" exception is that every party seeking to avoid arbitration will take a shot in federal court first, hoping to capitalize on the longstanding "judicial hostility to arbitration." *Green Tree*, 531 U.S. at 89. Aside from "burdening courts and individuals alike with needless expense and delay," *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 398 (1990), such an approach is contrary to the clear command of the Arbitration Act. This Court should reject it.

3. The 'Wholly Groundless' Exception Has No Basis In The History Of The Arbitration Act

Unable to justify the "wholly groundless" exception based on text or policy, respondent resorts to a selective retelling of the Arbitration Act's history. Those arguments, too, are deeply flawed.

a. Respondent contends that the legislative history reflects Congress's intent for Sections 3 and 4 of the Arbitration Act to "play a protective role in ensuring that parties would not be forced to arbitrate unexpectedly." Br. 33. But respondent notably does not claim that the history evinces an affirmative decision by Congress to adopt the "wholly groundless" exception (or anything like it). Rather, respondent asserts only that the "wholly groundless" exception is "cut from th[e] same cloth" as Sections 3 and 4. *Ibid.*

Whatever that means, nothing in the text of those sections—or any other section of the Arbitration Act—supports the view that Congress intended to create an unstated exception to the requirement that parties are bound to the terms of their arbitration agreements. See pp. 5-11, *supra*. And there is no need to create a "wholly groundless" exception to address any congressional concern about parties being forced to arbitrate arbitrability disputes without their consent; that concern is already met by the requirement that parties clearly and unmistakably delegate questions of arbitrability to the arbitrator.

b. Respondent next invokes New York arbitration law, which it contends served as a model for the Arbitration Act. As with its arguments on the Arbitration Act, however, respondent fails to point to any provision of the New York arbitration law that could provide a plausible basis for the "wholly groundless" exception. Respondent instead relies on a single New York decision, *S.A. Wenger & Co.* v. *Propper Silk Hosiery Mills, Inc.*, 146 N.E. 203 (N.Y. 1924), which it argues shows that "Congress * * * enacted the [Arbitration Act] against the backdrop of rare situations where arbitration is properly refused because the demand was patently meritless." Br. 34.

The decision in *S.A. Wenger* provides no aid to respondent. To begin with, the statement respondent quotes is dictum; the court in fact ordered the parties to arbitrate. See 146 N.E. at 204. In any event, that statement has nothing to do with arbitrability; it merely refers to the possibility of refusing to commit a party's claim to arbitration because of the weakness of the claim *on the underlying merits*. See *id.* at 203. And there is no reason to think that Congress was aware of *S.A. Wenger*, much less that statement, when it adopted the Arbitration Act; the bill that became the Arbitration Act was originally drafted in August 1923 and was effectively finalized in May 1924, but the decision in *S.A. Wenger* did not issue until December 1924. See Ian R. Macneil, *American Arbitration Law: Reformation, Nationalization, Internationalization* 91, 100 (1992).

c. Finally, respondent attempts to bolster its case for the "wholly groundless" exception simply by citing decisions from lower courts that have adopted that exception (or a similar rule). See Br. 34-35. At least in the context of the Arbitration Act, however, the "wholly groundless" exception dates back only to a Federal Circuit decision from a little over a decade ago—and the courts of appeals to have adopted the exception have made little effort to ground it in the Arbitration Act's text. See *Qualcomm Inc.* v. *Nokia Corp.*, 466 F.3d 1366 (2006); Pet. Br. 23-26.

Perhaps for that reason, respondent mostly relies on decisions from the context of labor arbitration, which is governed not by the Arbitration Act but by federal common law. But those decisions, too, provide little affirmative support for respondent's position. For example, in *Electrical Workers* v. *General Electric Co.*, 233 F.2d 85 (1st Cir. 1956), aff'd on other grounds, 353 U.S. 547 (1957), the court of appeals did "not pass[] upon the question of * * * arbitrability," instead remanding for the district

court to do so "in the first instance." *Id.* at 101. To be sure, the court of appeals advised the district court to respect any delegation of arbitrability to an arbitrator as long as "the applicant's claim of arbitrability is not frivolous or patently baseless." *Ibid.* But the only support the court cited for that assertion were dicta from another of its own decisions issued the same day and a district-court decision stating in passing that a claim of arbitrability was *not* frivolous. See *ibid.*

Even in the context of labor arbitration, moreover, this Court has long held, consistent with the Arbitration Act, that when "parties have agreed to submit all questions of contract interpretation to the arbitrator," the court's role "is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract." *Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564, 567-568 (1960). Although *Steelworkers* did not involve a delegation provision, the Court's message has been clear: "[t]he courts * * * have no business weighing the merits of the grievance" when "[t]he agreement is to submit all grievances to arbitration." *Id.* at 568. So too here.

* * * * *

At its heart, this is not a complicated case. Respondent has no answer to the text of the Arbitration Act or to this Court's precedents construing it: there is no exception in the Arbitration Act permitting a court to refuse to enforce a provision delegating arbitrability to the arbitrator on the ground that it deems the claim of arbitrability to be "wholly groundless." This Court should accordingly reject the court of appeals' adoption of such an exception. The judgment of the court of appeals should be vacated, and the case remanded for further proceedings.

Respectfully submitted.

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No. 17-1272

IN THE

Supreme Court of the United States

HENRY SCHEIN, INC., ET AL.,
Petitioners,

v.

ARCHER AND WHITE SALES, INC.,
Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Fifth Circuit

BRIEF OF AMERICAN ASSOCIATION FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

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QUESTION PRESENTED

When parties enter into a contract that delegates questions of arbitrability to an arbitrator, does the Federal Arbitration Act permit courts to require arbitration in any unrelated future dispute without first making an inquiry into the intended scope of the delegation?

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INTEREST OF *AMICUS CURIAE*[1]

The American Association for Justice was established in 1946 to safeguard victims' rights, strengthen the civil-justice system, and protect access to the courts. With members in the United States, Canada, and abroad, AAJ is the world's largest trial bar.

AAJ files this brief to highlight an important feature of this case that the parties have largely overlooked: that this case, and the "wholly groundless" doctrine more broadly, need not be reduced to the question whether an agreement to delegate arbitrability can be ignored if the underlying issue of arbitrability is clear. Instead, this case raises the question of how courts should go about construing the scope of a delegation of arbitrability in the first place. As this brief explains, there is no way of properly construing the scope of a delegation of arbitrability consistent with the parties' intent without considering, to at least some degree, the nature of the underlying contractual agreement. If courts cannot consider the nature of the underlying contractual agreement, that results in an absurdity: any valid delegation clause becomes, essentially, a delegation for life, allowing one party to force another to pay for and submit to a round of arbitration in any future dispute—no matter how unrelated.

Based on its members' experience with costly threshold litigation over issues of arbitrability—and its organizational concern for the development of the law on those issues—AAJ is well positioned to offer a unique perspective on these questions.

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs are on file with the Clerk.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents an attempt by the petitioners to uproot this Court's established doctrine. It is settled law that parties to a contract can delegate to an arbitrator the power to decide both the merits of disputes that arise between them and the arbitrability of those disputes. *See, e.g., First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). But, when it comes to delegations of arbitrability in particular, this Court has directed federal courts to apply a "heightened standard" to enforce an arbitration agreement, requiring "clear and unmistakable" evidence that the parties intended for their dispute's arbitrability to be decided by an arbitrator. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 69 n.1 (2010). This reflects "the fact that arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." *First Options of Chicago*, 514 U.S. at 943.

The petitioners try to circumvent this clear requirement by proposing a rule that would eliminate any meaningful inquiry into the parties' intent when it comes to construing a delegation of arbitrability. They argue that when two or more parties to a contract enter into such a delegation clause as to some potential disputes, it should bind them as to "any dispute." Pet. Br. 21.

The petitioners dress this theory up by casting it as an argument that courts cannot look through to the merits of an issue that the parties have delegated to an arbitrator. *Id.* But that obscures the fact that cases like this one require courts to construe the scope of delegation provisions themselves. Interpreting the contours of

those provisions in a way that effectuates the parties' intent requires courts to examine the contract as a whole, considering its context and, possibly, provisions that could be construed as exempting claims from arbitrability. That examination is required by this Court's precedent and the Federal Arbitration Act, and this Court should reject any theory that would prohibit it.

ARGUMENT

I. The FAA does not require a court to blindly enforce a delegation clause.

This Court's arbitration jurisprudence is grounded in the principle that the enforcement of arbitration agreements under the FAA is "a matter of contract." *First Options of Chicago*, 514 U.S. at 943. To that end, courts must ensure that arbitration agreements are enforced "according to the intentions of the parties," as "a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." *Id.* at 947, 943.

The Court's arbitration jurisprudence also rests on a key distinction between questions about the merits of an underlying dispute and "question[s] of arbitrability." *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 n.2 (2013). Questions of arbitrability "'include certain gateway matters, such as whether parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy.'" *Id.* (quoting *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003) (plurality opinion)). Although such gateway matters are presumptively for a court to decide, the Court has held that parties may delegate to an arbitrator not only questions about the merits of the underlying dispute but questions of arbitrability as well—at least if that delegation is made "clearly and

unmistakably." *See Rent-A-Center*, 561 U.S. at 69 n.1. Where a contract contains such a "delegation provision," this Court treats the clause as "simply an additional, antecedent agreement" to send certain gateway questions to an arbitrator along with questions about the underlying dispute. *Id.* at 69.[2]

The petitioners and their *amici* treat this case as if the sole question it raises is whether a court can look through that "antecedent agreement" and "independently analyze[] the merits of [a] movant's claim of arbitrability," even when that claim is wholly groundless. Pet. Br. 3; *see also* Br. of Chamber of Commerce, at 2 ("[C]ourts may not refuse to enforce an agreement to arbitrate a particular question—including the question of arbitrability—based on the court's view of the merits of that question."). In their view, this case deals only with the scope of an agreement's arbitration provision, and asks whether, if a dispute falls outside the scope of an underlying arbitration clause, courts can ignore the antecedent delegation provision.

But this case, and the "wholly groundless" doctrine more broadly, raise an antecedent issue that the petitioners and their *amici* spend little time on. That issue is how courts are supposed to interpret the scope of delegation provisions themselves. Where parties have adopted such an antecedent agreement to send arbitrability issues to an arbitrator, how are courts supposed to tell

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[2] To help distinguish between these two layers of agreements, this brief refers to a contractual agreement to arbitrate the merits of an underlying substantive claim as an "arbitration clause," and refers to an "additional, antecedent" contractual provision that delegates questions about arbitrability to an arbitrator as a "delegation provision."

whether that antecedent agreement covers a given situation?

It should be clear that courts are required to construe the scope of delegation provisions. As this Court has said, where parties include delegation provisions in contracts, "the FAA operates on this additional arbitration agreement just as it does on any other." *Rent-A-Center*, 561 U.S. at 70. So, when a party seeks to enforce a delegation provision via a stay or a motion to compel, the FAA requires that a court "be[] satisfied that the issue involved in such suit or proceeding is referable to arbitration" under the delegation provision, 9 U.S.C. § 3, or "be[] satisfied" that "the failure to comply" with the provision "is not in issue," *id.* § 4.

How, then, should courts interpret a delegation provision to ensure that it only delegates questions of arbitrability that the parties intended to submit to an arbitrator? The petitioners' answer appears to be that instead of engaging in any such interpretation, a court faced with a delegation clause must blindly enforce it. That follows from their belief that there is a clear "order of operations." Pet. Br. 21. First, they say, a court looks to see whether there is a "delegation of arbitrability"—that is, whether a valid delegation provision has been formed and entered into. *Id.* Then, if there is one, "the court must send the dispute to arbitration." *Id.* In the petitioners' view, there is no point at which the court must "be[] satisfied" that the dispute at issue is one whose arbitrability the parties intended to delegate. 9 U.S.C. §§ 3, 4.

But discarding the statutory text in this way would result in an absurdity. On this reading, a single valid delegation of arbitrability agreed to by two parties

becomes a delegation covering all disputes for life. To see why, consider the following scenario:

> Mr. Smith rents a car from Acme Car Rentals, and the rental agreement contains an arbitration clause governing "any dispute that arises out of the transaction." The rental agreement also contains a delegation provision delegating all issues of arbitrability to the arbitrator. Mr. Smith enjoys his car rental, returns the car, and no dispute arises. Six years later, Mr. Smith is walking down the road when he is hit and badly injured by a different car, rented from Acme by a stranger. It turns out that Acme had negligently maintained this car, so Mr. Smith sues Acme over its negligence. Acme moves to compel arbitration, pointing to the arbitration clause in its six-year-old rental agreement. It says that, because of the delegation provision, any dispute about the applicability of the clause must be sent to the arbitrator.

Under the petitioners' theory, a court would be required to grant the motion to compel. The petitioners are quite clear about this: if two parties have entered into a valid delegation provision, they say, "the parties can be conceived to have entered into a freestanding antecedent agreement providing that, if *any dispute* arose between them, the arbitrator would decide whether the dispute must be resolved by arbitration." Pet. Br. 21 (emphasis added).

This is a stark departure from settled law. The FAA respects and enforces only "the wishes of the contract parties." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 302 (2010) (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995)). As a result, it does not "override[] the principle that a court may

submit to arbitration only those disputes . . . that the parties have agreed to submit." *Id.* (internal quotation marks omitted). Yet that is the unavoidable consequence of the petitioners' proposed rule. It is highly implausible, to say the least, that when Mr. Smith signed the car rental agreement he agreed to pay for and submit to a round of arbitration in any future dispute—no matter how unrelated.

To require that a court blindly enforce the motion to compel in such a circumstance would also invert this Court's rule that "courts presume that the parties intend courts, not arbitrators, to decide . . . disputes about 'arbitrability.'" *BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 34 (2014). To be sure, parties may overcome this presumption with a valid delegation provision that is clear and unmistakable. *See, e.g., Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). But under the petitioners' theory, a single valid delegation provision in any contract between two parties would mean that, forevermore, any dispute between them in any context would have to first receive an arbitrator's approval to go to court. That makes no sense.

To avoid this outcome, courts must be able to interpret the scope of a delegation provision with some reference to the parties' expectations when they entered into the delegation provision. Doing that allows courts to construe the scope of delegation provisions like they do any other contract provision—by considering the terms of the contract in an effort to "give effect to the contractual rights and expectations of the parties." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010). Put another way: Courts may enforce the delegation of arbitrability to an arbitrator only to the extent that doing so would comport with the parties' intent.

Some doctrine like the "wholly groundless" doctrine is therefore necessary. That is because the problem of petitioners' desired all-encompassing delegation provision cannot be addressed by standard formation doctrines. In the above example, for instance, Mr. Smith and Acme have entered into a valid contract including a delegation provision. But after renting the car Mr. Smith could become an employee of Acme; or he could own land next to Acme; or he could be a business competitor of Acme's. In each of these cases, were a legal dispute to arise between Mr. Smith and Acme, it would be possible to ask "does this dispute relate to the contract Mr. Smith and Acme formed when he rented a car?" Any future dispute between Mr. Smith and Acme would generate such a gateway question. Prohibiting courts from examining gateway questions in any way therefore means that all future disputes would require an arbitrator's approval before Mr. Smith could proceed in federal court. But as the Fifth Circuit put it, the "mere existence of a delegation provision . . . cannot possibly bind" a party "to arbitrate gateway questions of arbitrability in *all* future disputes with the other party, no matter their origin." *Douglas v. Regions Bank*, 757 F.3d 460, 462 (5th Cir. 2014).

And make no mistake: such a scenario is not hypothetical. In *Douglas*, the plaintiff had opened a checking account with a bank and signed an agreement containing an arbitration clause and a delegation provision. *Id.* at 461. Her account closed less than a year later. *Id.* Several years after that, she was injured in an automobile accident, and one of her lawyers allegedly embezzled a portion of her settlement from that accident. *Id.* She sued to recover the funds, a suit that involved bringing negligence and conversion claims against the successor-in-interest of the bank that she used to have a checking

account with. *Id.* That bank then invoked the old delegation provision from the closed checking account agreement to try and force the arbitration of her entirely unrelated claims. *Id.*

Of course, some courts that have invoked a doctrine like the "wholly groundless" standard have framed the inquiry at times as whether the dispute "is within the scope of the arbitration provision," rather than as whether the dispute is within the scope of the delegation provision. *See, e.g.*, *Douglas*, 757 F.3d at 461, 463. But that just reflects the fact that two different inquiries may sometimes involve asking the same question. A court may ask "what is the underlying dispute about?" when it is trying to determine whether the dispute is subject to arbitration under an arbitration agreement; it can also ask the exact same question when it is trying to determine whether the dispute is the kind of dispute the parties expected to fall within the scope of a delegation provision.

The petitioners ignore this distinction, and argue that any inquiry into the relationship between a dispute and the underlying contractual agreement is forbidden. But in doing so, they essentially apply the delegation provision to itself, arguing that, because the provision prohibits courts from analyzing the scope of the parties' arbitration agreement, it also prohibits them from analyzing the scope of the delegation clause. That is not how the FAA works. Courts cannot abdicate their obligation to construe the intended scope of a delegation provision because it might involve asking questions that would also be asked in an inquiry regarding the merits of the arbitrability issue. Instead, the FAA requires courts to "be[] satisfied" that the parties intended an arbitration agreement to cover a given dispute. 9 U.S.C. §§ 3, 4. That

applies to delegation clauses just like any other agreement; this Court should decline the petitioners' invitation to construe valid delegation clauses to have limitless scope. Ultimately, where a dispute arises in which it is entirely implausible to believe the parties intended themselves to be bound by the delegation clause, courts should not turn a blind eye to the parties' intent and enforce those clauses.

II. When a court interprets a delegation clause, it should consider explicit carveouts from arbitration as evidence of the parties' intent.

As the previous section established, the FAA requires courts to interpret the scope of delegation provisions, which in turn requires an inquiry into the nature of the underlying agreement to which the delegation provision applies. This inquiry proceeds according to the familiar principle that contractual agreements must be "interpreted as a whole." *Mastrobuono*, 514 U.S. at 69 (quoting the Restatement (Second) of Contracts § 202(2) (1979)). When a court examines a contract to determine the scope of a delegation provision, explicit carveouts from arbitration like those in the contract at issue in this case are particularly relevant to the question of how best to understand a delegation provision.

This follows, in part, from the "heightened standard" this Court applies to purported delegations of arbitrability. *Rent-A-Center*, 561 U.S. at 69 n.1. As this Court has said, "unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *Id.* (quoting *AT&T Techs., Inc. v. Commc'ns Workers*, 475 U.S. 643, 649 (1986)). This "'clear and unmistakable' requirement . . . pertains to the parties' manifestation of intent, not the agreement's validity." *Id.*

(emphasis omitted). Courts, in other words, "should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence" of the parties' intent to do so. *Id.* (quoting *First Options of Chicago*, 514 U.S. at 944) (internal brackets omitted).

In some situations, of course, parties to a contract will exclude certain kinds of disputes from arbitration clauses but include a delegation provision that clearly leaves the arbitrability of those disputes to the arbitrator. Under *Rent-A-Center*, those delegation provisions must be honored. 561 U.S. at 70. But there will be many contracts in which an explicit carveout from arbitration either directly demonstrates that the parties did *not* intend to delegate arbitrability for a given set of disputes, or at least weighs heavily against a court finding clear and unmistakable evidence that they did so intend. Consider, for instance, the following scenario:

> A large employer, responding to increased social awareness of sexual harassment following the #MeToo movement, decides to modify the arbitration clause in its employment agreements by inserting a parenthetical exception. The modified employment agreements state: "Any dispute arising under or related to this Agreement (except for claims of sexual harassment or sexual assault) shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association."

As the petitioners note, courts frequently interpret an invocation of the American Arbitration Association's rules to be a delegation of arbitrability. Pet. Br. 6–7 (collecting cases). But a straightforward reading of the modified employment agreement here indicates that the parties intended that the AAA's rules should not be

applied to "claims of sexual harassment or sexual assault." It would thus be a mistake to construe any delegation of arbitrability implied by invoking the AAA's rules as extending to claims that are explicitly exempted from those rules. At the very least, it is far from clear that the parties "clearly and unmistakably" intended for a delegation of arbitrability to extend so far. *Rent-A-Center*, 561 U.S. at 69 n.1.

The petitioners' theory also ignores the basic principle of textual interpretation that "specific terms and exact terms are given greater weight than general language." Restatement (Second) of Contracts § 203(c) (1981). This theory, too, reflects the goal of giving effect to the parties' intent. As the Restatement puts it, "[a]ttention and understanding are likely to be in better focus when language is specific or exact, and in case of conflict the specific or exact term is more likely to express the meaning of the parties with respect to the situation than the general language." *Id.* cmt. e. As described in the example above, specific exclusions from arbitration are often inserted for a reason. To give priority to a broad, general delegation provision in the presence of a specific exclusion may thwart whatever reason the parties had for inserting the exclusion.

Contracting parties can, of course, delegate the issue of excluded disputes to arbitration if they truly intend to do so. A contract like the one above could say, for instance, that "all disputes about whether a claim falls within the exception for sexual harassment or sexual assault shall themselves be subject to binding arbitration." That would be a clear and unmistakable indication about the intended scope of the delegation.

In contrast, the petitioners' theory would create a trap for the unwary. Parties like the employer and

employee in the above hypothetical could reasonably assume that they have excluded claims from arbitrability *and* arbitration alike by explicitly writing a carveout like the one above. If courts construe "arbitration in accordance with the arbitration rules of the American Arbitration Association" to be both an arbitration clause and a delegation provision, it would be entirely reasonable for contracting parties to think that explicit language excluding certain claims from "arbitration in accordance with the arbitration rules of the American Arbitration Association" would exclude those claims from both the arbitration clause and the delegation provision as well. But the petitioners disclaim any serious attempt to examine the contract and discern the parties' intent; instead, they simply say that as long as there is a valid delegation provision, the parties "can be conceived" to have agreed to send "any dispute" to arbitration. Pet. Br. 21.

The petitioners' theory thus sweeps in to arbitration many parties who have specifically contracted to avoid such a result, and it does so for no reason that is necessary to benefit parties who do, in fact, wish to reach that result. The effect is that, for many disputes, one party will get unintended and unbargained-for leverage: the ability to force the other party into at least one round of arbitration on any dispute.

The petitioners argue that some arbitrators have procedures for summary disposition, and so such a round of arbitration *could* be resolved relatively quickly. Pet. Br. 35–36. But there is no guarantee that such procedures would exist for any given arbitration, or that if they exist they would be used. This is particularly true for cases in which a doctrine like the "wholly groundless" doctrine might apply, as a party seeking to send such a case to arbitration is almost surely intending to cause delay.

Even though arbitration is often invoked as a cheaper or faster alternative to litigation, that does not mean that, in absolute terms, it is always cheap and fast. Empirical studies of arbitration point to a "chorus of concern over the excessive length and cost of commercial arbitration in the United States," noting that arbitration's increasing complexity also results in increased delay and expense. Thomas J. Stipanowich, *Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals*, 25 Am. Rev. Int'l Arb. 297, 341–42 (2014). Even when the issue to be arbitrated is simply a gateway issue, arbitrators can call for witnesses, allow parties to conduct discovery, or require motions practice that results in many billed hours. Or, as the respondent points out, an arbitrator may decide to wait to rule on the arbitrability issue until after conducting an inquiry into the underlying dispute more fully. Resp. Br. 30. Arbitrators are often paid by the hour, which creates a financial incentive for them to keep cases, or at least to extend the time taken to decide whether to keep them. *See, e.g.*, Deborah Rothman, *Trends in Arbitrator Compensation*, Disp. Resol. Mag., Spring 2017, at 8–11. And arbitrators, like any adjudicator, can get things wrong—resulting in a case staying in arbitration that should not have gone to arbitration at all. These risks and expenses drive up the costs of potential arbitration *ex ante*, giving a party to a contract a meaningful threat if it can force a detour to arbitration on any possible dispute.

More broadly, the petitioners provide no good reason that such risk and waste should be *mandatory* features of every arbitration agreement containing a delegation provision. Courts should at least be able to consider whether there is any reason whatsoever to think that a given dispute was one that the parties would have in-

tended to be covered by their delegation provision. Explicit exclusion terms are meaningful evidence of the parties' intent, and parties who truly intend to delegate the arbitrability of would-be-excluded disputes have the means to do so without the broad rule that the petitioners seek. This Court should stick to the terms of the FAA, require courts to examine the scope of delegation clauses before enforcing them, and permit courts to look to explicit exclusions contained within contracts that indicate the parties' intent.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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September 25, 2018

No. 17-1272

IN THE

Supreme Court of the United States

HENRY SCHEIN, INC., *ET AL.*,
Petitioners,

v.

ARCHER AND WHITE SALES, INC.
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Federal permits a court to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes the claim of arbitrability is "wholly groundless."

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INTEREST OF *AMICUS CURIAE*[1]

The Atlantic Legal Foundation is a non-profit public interest law firm founded in 1976 whose mandate is to advocate and protect the principles of less intrusive and more accountable government, a market-based economic system, and individual rights. It seeks to advance this goal through litigation and other public advocacy and through education. Atlantic Legal Foundation's board of directors and legal advisory committee consist of legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists. Atlantic Legal's directors and advisors are familiar with the role arbitration clauses play in the contracts entered into between companies and between companies and consumers. Some of Atlantic Legal's directors and advisers have decades of experience with arbitration – as legal counsel, as arbitrators, and as members or supporters of organizations that administer arbitration regimes. They are familiar with the benefits of arbitration, especially the role of arbitration (and other "alternative dispute

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[1] The parties have consented to the filing of this brief, which consents have been lodged with the Court

Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary or other contribution to the preparation or submission of this brief.

resolution" mechanisms) in facilitating business and commerce and in alleviating the burdens on courts and parties.

INTRODUCTORY STATEMENT

Respondent Archer and White Sales, Inc. ("Archer"), a distributor, seller, and servicer for multiple dental equipment manufacturers, brought suit against Petitioners, Henry Schein, Inc., Danaher Corporation and certain subsidiaries of Danaher, distributors and manufacturers of dental equipment, alleging violations of Section 1 of the Sherman Antitrust Act and the Texas Free Enterprise and Antitrust Act, seeking both damages ("estimated to be in the tens of millions of dollars") and injunctive relief.

Petitioners moved to compel arbitration pursuant to a clause in a contract between one of the Petitioner's predecessors and Archer.

The district court referred the case to a United States Magistrate Judge. Following a hearing, the magistrate judge issued a Memorandum Order holding that, *inter alia*, (1) the incorporation of the AAA Rules in the arbitration clause clearly evinced an intent to have the arbitrator decide questions of arbitrability; (2) there is a reasonable construction of the arbitration clause that would call for arbitration in this dispute. The district court vacated the magistrate judge's order and held that the court could decide the question of arbitrability, and that the dispute was not arbitrable because the plain language of the arbitration clause expressly excluded suits that involved requests for

injunctive relief. *Archer & White Sales, Inc. v. Henry Schein, Inc.*, No. 2:12-cv-572- JRG-RSP, 2013 WL 12155243 (E.D. Tex. May 28, 2013), *vacated*, 2016 WL 7157421 (E.D. Tex. Dec. 7, 2016).

The court of appeals outlined its analytical process thus: Enforcement of an arbitration agreement involves two analytical steps. First, a court must decide "whether the parties entered into *any arbitration agreement at all*; this inquiry is one of pure contract formation, and it looks only at whether the parties formed a valid agreement to arbitrate some set of claims. Pet. App. 4a. The next step is to determine whether the dispute at issue is covered by the arbitration agreement."[9] Before this step, however, the court must answer a third question: "[*w*]*ho should have the primary power to decide*' whether the claim is arbitrable." Pet. App. 5a This question turns on "whether the agreement contains a valid delegation clause – that is, if it evinces an intent to have the arbitrator decide whether a given claim must be arbitrated.'" *Id.*

The Fifth Circuit succinctly noted that "[T]he parties. . .disagree on whether the court or an arbitrator should decide the gateway question of arbitrability – and relatedly, whether the underlying dispute is arbitrable at all. *Id.*

The court of appeals affirmed, based on that court's decision in *Douglas v. Regions Bank*, 757 F.3d 460, 464 (5th Cir. 2014). In *Douglas* the court held that even if the parties "clearly and

unmistakably" intended to delegate the question of arbitrability to an arbitrator, the motion to compel arbitration should nevertheless should not be granted "[i]f the argument that the claim at hand is within the scope of the arbitration agreement is 'wholly groundless." *Douglas*, 757 F.3d at 464. The court of appeals then held that where there is no "plausible argument . . . the district court may decide the 'gateway' issue of arbitrability despite a valid delegation clause.'" Pet. App. 6a.

SUMMARY OF ARGUMENT

The decision of the court below, based on a selective and contorted reading of the arbitration agreement, negates the overriding federal policy of encouraging arbitration and enforcing arbitration agreements according to the intent of the parties. It does not heed this Court's recent teaching on the enforceability of arbitration agreements that "the overarching purpose of the Federal ("FAA" or "Act") is to ensure the enforcement of arbitration agreements according to their terms" and to "facilitate streamlined proceedings." *AT&T Mobility LLC v. Concepcion*,563 U.S. 333, 344 (2011).

The court below refused to enforce the arbitration agreement according to its terms, and instead adopted an exception that negates the parties' choice to have the arbitrator decide all issues, including the "gateway" issue of arbitrability. The court of appeals' holding that "[i]f an 'assertion of arbitrability [is] wholly groundless,' the court need not submit the issue of arbitrability

to the arbitrator," Pet. App. 12a, notwithstanding the language of the arbitration agreement and the incorporated rules of the arbitral tribunal[2]) misapplies federal arbitration law and exemplifies the very "judicial hostility towards arbitration," which the FAA was intended to foreclose. *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012) (*per curiam*); *Concepcion*, 563 U.S. at 339; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

The "wholly groundless" doctrine creates a sweeping exception to the overriding federal policy of encouraging arbitration and enforcing arbitration agreements according to the intent of the parties. It threatens to swallow the rule

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[2] The court of appeals recognized that "[a] contract need not contain an express delegation clause to meet this standard. An arbitration agreement that expressly incorporates the AAA Rules [for example] presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." Pet. App. 7a. (Citations and internal quotation marks omitted.) Under AAA Rule 7(a), "the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement."

The Dealer Agreement provides that "[a]ny dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets, or other intellectual property of [the predecessor]), shall be resolved by binding arbitration *in accordance with the arbitration rules of the American Arbitration Association*." Pet. App. 6a-7a.

established by this Court's recent teaching on the enforceability of arbitration agreements that the overarching purpose of the FAA is to ensure the enforcement of arbitration agreements "according to their terms" and to facilitate streamlined proceedings and creates a scheme inconsistent with the FAA.

This Court should reverse the judgment below.

ARGUMENT

THE FIFTH CIRCUIT'S DECISION IS INCONSISTENT WITH THE FEDERAL AND THIS COURT'S TEACHING WITH RESPECT TO THE ENFORCEABILITY OF ARBITRATION AGREEMENTS

Amicus urges the Court to reverse the Fifth Circuit's decision and to confirm its holdings in *Concepcion*, *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010) and other cases which recognize the overriding Congressional policy of encouraging arbitration. This Court should make it clear that there is no "wholly groundless" exception to that overriding policy simply based on the court's evaluation of the persuasiveness of each side's arguments regarding the arbitrability of a dispute. If the parties have explicitly or implicitly by adopting certain arbitration protocols assigned the decision as to arbitrability to the arbitrator[s] in a facially valid agreement, that should end the judicial inquiry. arbitration relative to the potential recovery in individual arbitration.

This Court has repeatedly held that the "fundamental principle [is] that arbitration is a matter of contract," *Concepcion*, 563 U.S. at 339 (quoting *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010)); *see also Stolt-Nielsen*, 559 U.S. 662, 681 (2010); *Volt Information Sciences, Inc. v. Board of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989), and that courts must enforce arbitration agreements according to their terms, *Volt*, 489 U.S. at 478; *Stolt-Nielsen*, 559 U.S. at 682; and "courts must 'rigorously enforce' arbitration agreements according to their terms. . . ." *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304, 2309 (2013); *see also Stolt-Nielsen*, 559 U.S. at 683. The court of appeal's decision frustrates these principles and this Court's teaching that the FAA "embodies . . . [a] national policy favoring arbitration," *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); *see also, Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

"[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," *Moses H. Cone*, 460 U.S. at 24-25 & n.32; *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

Arbitration permits parties to design "efficient, streamlined procedures tailored to the type of dispute" at issue. *Concepcion*, 563 U.S. 333, 344 (2011); it produces "expeditious results." *Mitsubishi Motors Corp. v. Soler Chrysler-*

Plymouth, Inc., 473 U.S. 614, 633 (1985); and it "reduc[es] the cost" of dispute resolution. *Concepcion*, 563 U.S. at 345.

The FAA was enacted to "reverse the longstanding judicial hostility to arbitration agreements." *Gilmer*, 500 U.S. 20, 24 (1991) and reflects "a liberal federal policy favoring arbitration." *Concepcion*, 563 U.S. at 339 (internal quotation marks and citation omitted).

The court of appeals' decision in this case is not a faithful application of federal arbitration law and exhibits the continued "judicial hostility towards arbitration" that the FAA was intended to foreclose, *Nitro-Lift Technologies L.L.C. v. Howard*, 568 U. S. 17 (2012) (*per curiam*), quoting *Concepcion*, 131 S. Ct. at 1745, 1747, 1757; *see also Gilmer*, 500 U.S. 20, 24 (1991).

FAA § 2, the "primary substantive provision of the Act," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), provides that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "That provision creates substantive federal law regarding the enforceability of arbitration agreements," requiring courts "to place such agreements upon the same footing as other contracts." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009) (internal quotations omitted); *see also Preston v. Ferrer*, 552 U.S. 346, 349 (2008). The last clause of § 2 preserves the ability of States to apply "'generally applicable contract defenses,

such as fraud, duress, or unconscionability,'" to the enforcement of arbitration agreements, but it precludes application of any state-law "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 131 S. Ct. at 1746 (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

FAA sections 3 and 4 implement the substantive pro-arbitration policy of section 2. Section 3 requires courts to stay litigation of arbitrable claims so that arbitration may proceed "in accordance with the terms of the [arbitration] agreement." 9 U.S.C. § 3. Section 4 provides that "the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement" unless "the making of the agreement for arbitration or the failure to comply therewith" are called into question. *Id.* § 4.

Under the FAA, "parties are generally free to structure their arbitration agreements as they see fit." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (internal quotations omitted). "[T]he FAA lets parties tailor ... many features of arbitration by contract, including the way arbitrators are chosen, what their qualifications should be, which issues are arbitrable, along with procedure and choice of substantive law." *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008).

Parties that choose an arbitral forum do so principally to "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi*, 473 U.S. at 628. The parties' freedom to fashion their own arbitration agreements includes not only the ability to define "by contract the issues which they will arbitrate," but also the right to delineate the procedural "rules under which that arbitration will be conducted." *Volt*, 489 U.S. at 479; see also *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009) (informality of arbitral proceedings is "not a basis for finding the forum somehow inadequate").

FAA's mandate that courts enforce arbitration agreements according to their terms applies in disputes over "gateway" issues of arbitrability, including whether a particular claim falls within the scope of the arbitration provision. See *id.* at 69. And it applies in disputes over the antecedent question of who decides such gateway issues: the court or the arbitrator. See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943-944 (1995).

Although there is a presumption that courts resolve gateway disputes of arbitrability, the presumption will be overridden if the parties "clearly and unmistakab[ly]" agree to "arbitrate arbitrability." *First Options*, 514 U.S. at 944.This "delegation provision" is treated as an "additional, antecedent agreement the party seeking arbitration asks the federal court to enforce," and

the FAA "operates on this additional agreement just as it does on any other." *Rent-A-Center*, 561 U.S. at 70. The delegation applies to virtually all gateway disputes, including disputes over whether the arbitration agreement covers a particular dispute. *Id.* at 68-69.

The "federal substantive law of arbitrability," is the "body of federal substantive law" interpreting and effectuating FAA § 2, the statute's "primary substantive provision" and nothing in that body of law suggests that it is appropriate for courts to create exceptions to the FAA based on their view of the policy of other federal laws. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24, nor does the federal substantive law of arbitrability allow courts to promulgate judge-made rules that frustrate the FAA's purposes, on the theory that doing so might advance the purpose of some other law. *See Concepcion*, 131 S. Ct. at 1748. On the contrary, just as *Concepcion* held that the FAA preempts state-law rules that insist on class arbitration as a condition of enforcement, the judicially crafted "wholly groundless" rule likewise is contrary to the federal substantive law of arbitrability.

The Seventh Circuit in *Douglas*, 757 F.3d 460, the source of the "wholly groundless" rule, acknowledged that the rule "necessarily requires us to examine and, to a limited extent, construe, the underlying agreement." *Id.* at 463. But this Court in *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643 (1986), instructed that, when "deciding whether the

parties have agreed to submit a particular grievance to arbitration," a court "ha[s] no business weighing the merits of the grievance," because "[t]he agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious." *Id.* at 650; see also *Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, 568 (1960) and the court "is not to rule on the potential merits of the underlying claims." *Concepcion* at 649. The merits of a claim have no bearing on the enforceability of the arbitration agreement, because when the parties agree to arbitrate disputes they vest the authority to decide the merits in the arbitrator, not in the courts.

The same principle applies when the issue to be arbitrated concerns a gateway issue of arbitrability. When parties agree to delegate the authority to decide arbitrability to the arbitrator, the arbitrator is authorized to decide whether a particular dispute falls within the range of disputes that the parties agreed to arbitrate. See *Rent-A-Center*, 561 U.S. at 70. The merits of the claims do not factor into the analysis. See *AT&T Technologies*, 475 U.S. at 649-650.

The circuit court's reading of the FAA makes it likely that federal district courts will be the initial venue for what should be arbitration issues on the merits. This will greatly increase litigation costs and complexity because it effectively requires a judicial proceeding whenever a litigant can conjure a colorable reason the adversary's demand for arbitration is "wholly groundless." arbitration

agreement a federal law claim is asserted. The party seeking to arbitrate in accord with the arbitration agreement may be required to spend many times the cost of an arbitral proceeding and many months (or, as in this case, years) of court proceedings to enforce the arbitration clause. Courts will likely be drawn into inquiring into the merits of the claims and defenses, whether the claim is dismissible on such standard defenses as statute of limitations, laches or res judicata. The issues the trial court decides may create grounds for appeal, adding more expense and delay.

The switch from the arbitrator deciding if the dispute as a whole or particular claims are arbitrable to a court deciding "gateway issues" negates principal benefits of arbitration – informality, economy and expedition – and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Concepcion*, 131 S. Ct. at 1751. The "wholly groundless" doctrine effectively nullifies those advantages. Under the doctrine, a court can preclude arbitration whenever it concludes, based on its own interpretation of the arbitration agreement, that there is no "legitimate argument that [the agreement] covers the present dispute." Pet. App. 11a.

The court of appeals seemed to mollify this rule by adding that an assertion of arbitrability is not 'wholly groundless' if 'there is a legitimate argument that th[e] arbitration clause covers the present dispute, and, on the other hand, that it

does not'" and if a court can find "a 'plausible' argument that the arbitration agreement requires the merits of the claim to be arbitrated," the wholly groundless exception will not apply." Pet. App. 12a. These words would seem to have little effect in practice, for in this case the magistrate judge found that the gateway issue was arbitrable, meeting, we submit, the "plausible argument" threshold.

The "wholly groundless" doctrine creates an incentive for a party with even a colorable argument against arbitration to challenge the agreement in court, leading to protracted proceedings that could include motion practice, a "mini-trial" over arbitrability and appeals, as this case itself demonstrates. It would, in short, "breed[] litigation from a statute that seeks to avoid it." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 275 (1995).[3]

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[3] The concern that arbitrators may make mistakes in adjudicating the issue of arbitrability, see Br. in Opp. 2 n.1, applies to arbitrators' decisions on the merits as well as on "gateway" issues. It is a concern that the parties have, presumably, considered in deciding whether to enter into an arbitration agreement at all. It is a concern that can be ameliorated by the parties' choice of arbitrator[s]. In fact, many arbitrators are retired judges or accomplished lawyers, capable of deciding the most complex issues. Further, arbitrators are presumed to be competent and diligent. See *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987); *Mitsubishi Motors*, 473 U.S. at 634.

Even if then arbitration agreement is enforced at the end of the judicial proceeding, the party seeking to arbitrate may have already spent many times the cost of an arbitral proceeding just enforcing the arbitration clause. The predictable result is that the decision below will render arbitration too expensive and too slow to serve any of the arbitration agreement's or the FAA's essential purposes. See *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995).

There is no valid basis for recognizing a "wholly groundless" exception to the FAA's mandate to "rigorously enforce arbitration agreements according to their terms." *Italian Colors*, 133 S. Ct. at 2309 (internal quotation marks and citation omitted).

When the parties agree to assign gateway issues of arbitrability to the arbitrator the FAA requires a court to "respect and enforce" that agreement. *Epic Systems*, 138 S. Ct. at 1621.

The "wholly groundless" doctrine does not promote the FAA's policy. The decision below undermines the key benefits of arbitration by turning the threshold arbitrability question into a detailed inquiry into the merits of the parties' claims and defenses. Judicial "screening" of arbitration cases defeats the FAA's core purpose of ensuring streamlined proceedings according to the parties' contractual intent and hints at the "judicial hostility to arbitration" that led Congress to enact the FAA early last a century. *Green Tree*

Financial Corp.-Alabama v. Randolph, 531 U.S. 79, 89 (2000); *Gilmer*, 500 U.S. 20, 24 (1991); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-511 (1974).

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae George A. Bermann is the Jean Monnet Professor of EU Law, Walter Gellhorn Professor of Law, and the director of the Center for International Commercial and Investment Arbitration (CICIA) at Columbia Law School. A Columbia Law School faculty member since 1975, Professor Bermann teaches courses in, and has written extensively on, transnational dispute resolution (international arbitration and litigation), European Union law, administrative law, and WTO law. He is an affiliated faculty member of the School of Law of Sciences Po in Paris and the MIDS Masters Program in International Dispute Settlement in Geneva. He is also a visiting professor at the Georgetown Law Center.

Professor Bermann is an active international arbitrator in commercial and investment disputes; chief reporter of the ALI's Restatement of the U.S. Law of International Commercial and Investor-State Arbitration; co-author of the UNCITRAL Guide to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; chair of the Global Advisory Board of the New York International Arbitration Center (NYIAC); co-editor-in-chief of the American Review of International Arbitration; and founding member of the governing body of the ICC Court of Arbitration and a member of its standing committee.

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief. This brief is submitted pursuant to the blanket consent letter of petitioners and the blanket consent letter of respondent.

Professor Bermann is interested in this case because it presents a highly important but unsettled issue of domestic and international arbitration law relating to the application of the test in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), for determining whether parties have agreed to delegate to arbitral tribunals primary responsibility for determining arbitrability. The issue is whether incorporation of rules of arbitral procedure constitutes "clear and unmistakable" evidence, within the meaning of *First Options*, that the parties intended to withdraw from courts authority to determine the arbitrability of a dispute, on account of the fact that those rules, as in this case, contain a clause authorizing arbitrators to determine their own jurisdiction.

Although a majority of courts have found the incorporation of rules containing such a provision to satisfy *First Options'* "clear and unmistakable" evidence test, the ALI's Restatement of the U.S. Law of International Commercial and Investor-State Arbitration has concluded, after extended debate, that these cases were incorrectly decided because incorporation of such rules cannot be regarded as manifesting the "clear and unmistakable" intention that *First Options* requires. This case presents an opportunity to settle the meaning and application of the *First* Options test and thereby preserve the proper balance under federal law between the roles of courts and arbitrators in determining arbitrability.

SUMMARY OF ARGUMENT

This case involves the classic question of who has primary responsibility for determining arbitrability – a court or an arbitrator. Since this Court's decision in *First Options*, the law has been settled that "[t]he question of whether the parties have submitted a particular dispute to arbitration, i.e., the 'question of arbitrability' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'" *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 77, 83 (2002) (internal citations omitted). What remains unsettled, however, is whether the incorporation in a contract of arbitral rules containing a provision empowering a tribunal to determine its own jurisdiction satisfies the "clear and unmistakable" evidence test.

The way the principal question in this case is presented simply assumes that the parties to the underlying contract entered into an "agreement delegating questions of arbitrability to an arbitrator." Pet. at I. More particularly, it assumes that, in adopting procedural rules recognizing the right of arbitrators to determine their own jurisdiction, the parties clearly and unmistakably agreed to delegate primary responsibility for determining arbitrability to the arbitrator in accordance with the requirements of *First Options*.

That assumption is incorrect. The incorporation of arbitral rules that – like the arbitral rules here – contain a simple provision empowering a tribunal to determine its own jurisdiction (known in international arbitration circles as a "competence-competence" clause) falls far short of establishing by clear and unmistakable evidence that the parties intended to withdraw from courts the authority to determine

whether an arbitration agreement was formed, whether the arbitration agreement is valid, and whether the dispute falls within the scope of that agreement – issues that this Court has termed "gateway" issues of arbitrability due to their fundamental importance in terms of party consent.

In this case, the Fifth Circuit properly found that the issue of arbitrability was for the court and not the arbitrator. However, it failed to base that conclusion on the ground that no delegation of authority had in fact been made. Instead, it decided this case on the basis of the "wholly groundless" doctrine, which assumes a valid delegation, but still permits a court to determine whether the dispute at hand manifestly falls outside the scope of the agreement to arbitrate.[2] Pet. App. 15a-16a.

This case thus presents the important question, that can only be resolved by the Court, whether incorporation by reference in an arbitration agreement of arbitral rules containing a competence-competence clause satisfies the requirement of clear and unmistakable evidence that the parties intended to delegate to the arbitrators primary authority to determine arbitral jurisdiction, within the meaning of *First Options*. Only this Court can conclusively resolve this

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[2] The Fifth Circuit adopted the two-step approach to the "wholly groundless" doctrine articulated by the Federal Circuit:

> That court set out a two-step process: (1) did the parties "unmistakably intend to delegate the power to decide arbitrability to an arbitrator; and if so, (2) is the assertion of arbitrability 'wholly groundless.'"

Douglas v. Regions Bank, 757 F.3d 460, 463 (5th Cir. 2014) (quoting *Agare Systems, Inc. v. Samsung Electronics Co.*, 560 F.3d 337, 340 (5th Cir. 2009)).

important question because it fundamentally implicates the standard adopted by the Court in *First Options*.

There is a genuine need for the Court to clarify whether the incorporation of arbitral rules satisfies the *First Options* test. Here, as in many cases, there is no express delegation provision in the arbitration clause, but only the incorporation of arbitral rules containing competence-competence language. The courts have reached different results in addressing the *First Options* issue that is presented here.

In this case the Magistrate Judge concluded that there was a valid delegation because the rules of the American Arbitration Association "very clearly state that the question of the arbitrability of a dispute is referred to the arbitrator under the AAA rules." Pet. App. 41a. The district court disagreed, finding that "there is no reason to believe that incorporation of the AAA rules . . . should indicate a clear and unmistakable intention that the parties agreed to arbitrate the question of arbitrability in these circumstances." Pet. App. 34a. The Court of Appeals did not decide whether incorporation of the AAA arbitration rules in the parties' arbitration agreement constituted a clear and unmistakable delegation to the arbitrator, but instead invoked the "wholly groundless" doctrine, Pet. App. 10a-11a, which presupposes a valid delegation.

A majority of courts that have addressed the issue of whether the presence of competence-competence language in the arbitral rules adopted by the parties constitutes a proper delegation to the arbitrator have concluded, as has the Fifth Circuit, "that the express adoption of [the AAA Rules] presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." *Petrofac, Inc. v. Dyn McDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir.

2012).[3] However, none of these decisions provides any reasoning whatsoever as to how or why incorporation of such arbitral rules meets the clear and unmistakable evidence test.

The ALI Restatement of the U.S. Law of International Commercial and Investor-State Arbitration ("Restatement") has considered in depth the proposition that the presence of a competence-competence provision in the arbitral rules incorporated by reference in an arbitration agreement satisfies the *First Options* test, as well as the case law on which that proposition is based. The Restatement has concluded that the incorporation of arbitral rules like the AAA rules does not in fact constitute clear and unmistakable evidence of an intention to arbitrate arbitrability as required by *First Options*.[4]

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[3] *See, e.g., Oracle Am., Inc. v. Myriad Group, A.G.*, 724 F.3d 1069, 1074-1075 (9th Cir. 2013) (noting that the "prevailing view" is that incorporation of the UNCITRAL rules "is clear and unmistakable evidence that the parties agreed the arbitrator would decide arbitrability"); *Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766, 769 (8th Cir. 2011) ("By incorporating the AAA Rules, the parties agreed to allow the arbitrator to determine threshold questions of arbitrability"); *Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7, 11 (1st Cir. 2009) (incorporation of AAA rules provides "clear and unmistakable evidence" that parties meant to arbitrate arbitrability); *but see, e.g., Riley Mfg. Co., Inc. v. Anchor Glass Container Corp.*, 157 F.3d 775, 777 n.1, 780 (10th Cir. 1998) (stating that arbitration agreement incorporating AAA rules did not indicate "a specific intent to submit to an arbitrator" the question of arbitrability); *Duthie v. Matria Healthcare, Inc.*, 535 F. Supp. 2d 909, 916 (N.D. Ill. 2008) (incorporation of AAA rules is not "clear and unmistakable evidence" of agreement to arbitrate arbitrability when arbitration clause does not provide for arbitration of all disputes).

[4] Restatement § 2-8 reporter's note b(iii) (Tentative Draft No. 4, 2015) ("The Restatement rejects the majority line of cases as based on a misinterpretation of the institutional rules being ap-

In this case, the only basis on which the court below could find that there was clear and unmistakable evidence of an intent to withdraw from the courts authority to determine whether the dispute at hand falls within the scope of the parties' arbitration clause was the incorporation of arbitral rules containing "competence-competence" language. Since "competence-competence" language does not satisfy the *First Options* test of "clear and unmistakable" evidence, there was no proper delegation to an arbitrator of primary responsibility to determine arbitrability, and accordingly that issue remained primarily for a court to decide.

Therefore, although based on other grounds, the judgment of the Court of Appeals affirming the district court's decision to decide rather than delegate the question whether the claim in this case is arbitrable was correct under *First Options* and should be affirmed.

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plied. First, and most fundamentally, the rules do not purport to give arbitrators the exclusive authority to rule on the enforceability of the arbitration agreement. They make clear that arbitrators have the power to rule on such issues if raised before them, but they do not include language that excludes judicial authority over those issues.").

ARGUMENT

I. THE INCORPORATION OF ARBITRATION RULES CONTAINING "COMPETENCE-COMPETENCE" LANGUAGE DOES NOT CONSTITUTE THE CLEAR AND UNMISTAKABLE EVIDENCE OF AN INTENT TO ARBITRATE ARBITRABILITY REQUIRED BY *FIRST OPTIONS*

A. The *First Options* Test.

This case involves the threshold issue of who – court or arbitrator – has primary responsibility for deciding issues of arbitrability, including whether a claim comes within the scope of the parties' arbitration clause. Both courts and arbitral tribunals have a role to play in determining issues of arbitrability. In some cases, the issue of arbitrability is raised in a judicial proceeding to enforce an arbitration clause by compelling arbitration or staying a lawsuit in favor of arbitration. *See* 9 U.S.C. §§ 3-4. In other cases, the issue of arbitrability may be raised before the arbitrator as a defense to the arbitrator's jurisdiction and then later determined by a court in connection with judicial enforcement of the award. *See, e.g., First Options*, 514 U.S. at 941. In either situation, courts must determine who – court or arbitrator – has primary responsibility for resolving the parties' dispute as to arbitrability.

In *First Options*, this Court articulated the framework for determining whether a court or arbitrator had primary responsibility for determining certain gateway issues of arbitrability, such as "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." *Howsam*, 537 U.S. at 84.

The *First Options* framework turns on what the parties agreed about the allocation of authority to determine arbitrability. The key rule is that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *First Options*, 514 U.S. at 944 (quoting *AT&T Technologies*, 475 U.S. 643, 649 (1986). In other words, "courts presume that the parties intend courts, not arbitrators, to decide . . . disputes about 'arbitrability'" unless "the parties clearly and unmistakably provide otherwise.'" *BG Group, PLC v. Republic of Argentina*, 572 U.S. 25, 34, (2014) (internal citations omitted); *Howsam*, 537 U.S. at 83.

This Court has not addressed what specific language is necessary to constitute the clear and unmistakable evidence capable of overcoming the presumption that arbitrability is primarily for the courts. However, it has indicated that the language chosen must unambiguously establish the "parties' *manifestation of intent*" to withdraw from courts authority to resolve issues of arbitrability. *Rent-A-Center, West Inc. v. Jackson*, 561 U.S. 63, 69 n.1 (2010).

The kind of manifestation of intent that satisfies the clear and unmistakable evidence test is illustrated by the delegation clause in the *Rent-A-Center* case. There, the parties agreed that the "'Arbitrator, and not any federal, state or local court or agency, shall have *exclusive* authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this [Arbitration] Agreement" (emphasis added). *Rent-A-Center*, 561 U.S. at 66. This delegation provision expressly addressed the role of both courts and arbitrators and clearly stated that the tribunal had not only primary, but indeed exclusive, authority to resolve issues of arbitrability. There

can be no doubt that the delegation language in *Rent-a-Center* was both clear and unmistakable.

B. The Competence-Competence Language in Arbitration Rules Does Not Reflect Clear and Unmistakable Evidence.

The language relied upon in this case to establish a delegation under *First Options* is dramatically different from the language in *Rent-A-Center*. The parties provided in their arbitration clause for binding arbitration "in accordance with the arbitration rules of the American Arbitration Association." JA 58. Rule 6 of the Commercial Arbitration Rules of the American Arbitration Association ("AAA"), like most modern arbitral rules,[5] contains a competence-competence clause stating that the "arbitrator shall have power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." JA 79. In other words, the parties agreed to arbitral rules that confer power on arbitrators to decide their own jurisdiction.

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[5] *See, e.g.*, CPR Rules for Non-Administered Arbitration of International Disputes, art. 8.1 (Mar. 1, 2018) ("The Tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement."); Rules of Arbitration of the International Chamber of Commerce, art 6(3) (Mar. 1, 2017) ("[A]ny question of jurisdiction ... shall be decided directly by the arbitral tribunal ..."); ICDR International Dispute Resolution Procedures, art. 19(1) (Jun. 1, 2014) ("The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement(s) ..."); United Nations Commission on International Trade Law Arbitration Rules, art. 23(1), G.A. Res. 65/22, U.N. Doc. A/RES/65/22 (Jan. 10, 2011) ("The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to existence or validity of the arbitration agreement.").

However, there is no indication in Rule 6 that the conferral on arbitrators of authority to determine their jurisdiction divests courts of all authority to make that determination. Nevertheless, a majority of courts that have addressed this question have summarily concluded, as has the Fifth Circuit, that "the express adoption of these [arbitration] rules presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." *Petrofac, Inc.*, 687 F.3d at 675.[6]

For several reasons, the courts drawing this inference are mistaken in doing so.

First, competence-competence language simply does not have the meaning attributed to it. It unquestionably authorizes an arbitral tribunal to resolve challenges to its own jurisdiction during the course of an arbitration, so that if its jurisdiction is challenged, it need not suspend proceedings and await a court determination of arbitrability; the tribunal may make that determination for itself. But competence-competence does not mean that a tribunal's jurisdiction to determine arbitrability is exclusive of a court's authority to do so, if so requested. Competence-competence has never been understood in U.S. law to render arbitral authority to determine arbitrability exclusive. Section 4 of the Federal Arbitration Act authorizes a court to compel arbitration "upon being satisfied that the making of the agreement for arbitration ... is not in issue." 9 U.S.C. § 4. Thus, the presumption is that courts have that authority – an au-

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[6] *See, e.g., Oracle Am., Inc.*, 724 F.3d at 1074-1075 (incorporation of UNCITRAL rules is "clear and unmistakable evidence" of intent to arbitrate arbitrability) *Awuah*, 554 F.3d at 11 (1st Cir. 2009) (same with respect to AAA rules). *But see Riley Mfg. Co., Inc.*, 157 F.3d at 777 n.1, 780 (stating incorporation of AAA rules did not evidence "specific intent" to arbitrate arbitrability).

thority that, under *First Options*, cannot in fact be withdrawn with anything less than "clear and unmistakable" evidence of an intention to that effect. U.S. law on the matter is different from the law of other countries, under which competence-competence is viewed as *both* vesting tribunals with authority to determine arbitrability *and* divesting courts of that authority.[7]

It is uncontroversial that under U.S. law competence-competence confers on arbitral tribunals an authority to determine arbitrability that is non-exclusive. Competence-competence does not acquire a different and much more far-reaching meaning merely because it is inserted into incorporated rules of arbitration, or indeed into an arbitration agreement itself. A competence-competence clause cannot constitute clear and unmistakable evidence of a delegation within the meaning of *First Options*.

Second, the decision in *First Options* makes it clear that reservation to courts of the authority to determine arbitrability is *the rule*, and that divesting it of that authority is *the exception*. That can no longer be the case if the mere inclusion of a competence-competence clause in the rules adopted by the parties is viewed as clear and unmistakable evidence under *First Options*. Competence-competence provisions are ubiquitous. They are found not only in many arbitration agreements, but in virtually all modern rules of arbitration and all modern arbitration laws. Very few international arbitrations are conducted in the ab-

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[7] *See generally* Emmanuel Gaillard & Yas Banifatemi, *Negative Effect of Competence-Competence: The Rule of Priority in Favor of the Arbitrators*, *in* ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE 257 (E. Gaillard & D. Di Pietro eds., 2008).

sence of a competence-competence clause. They have become, for all practical purposes, "boiler-plate." Thus, treating them as clear and mistakable evidence of an intention to delegate in effect makes delegation *the rule* and the court's right to determine arbitrability *the exception*.

Courts must not lightly find clear and unmistakable evidence within the meaning of *First Options*. It is fundamental that parties are not required to arbitrate without their consent. Arbitration's legitimacy depends on that.[8] It is because arbitrability questions so seriously implicate party consent that courts entertain challenges to arbitrability, including an assertion that the arbitration agreement to which a party subscribed does not encompass the dispute at hand.

The Restatement considered carefully the question whether the incorporation of competence-competence language, as here, constitutes clear and unmistakable evidence of an intent to withdraw courts' authority to determine arbitrability. The Restatement found that none of the decisions addressing this issue provides any meaningful reasoning as to how or why a competence-competence provision not only confers power on an arbitrator to determine arbitrability, but withdraws that power from the courts. The Restatement concluded after extensive debate that the majority of cases are incorrectly decided. "The Restatement rejects the majority line of cases as based on a misinterpretation of the arbitral rules" that were applicable in those cases.[9] The position taken by the Re-

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[8] *See* George A. Bermann, *The "Gateway Problem" in International Commercial Arbitration*, 37 Yale J. Int'l L. 1 (2012).

[9] Restatement § 2-8 reporter's note b(iii) (Tentative Draft No. 4, 2015).

statement has been finally approved by the ALI and is official.[10]

The Restatement's conclusion is based on all the considerations set forth above. By incorporating a competence-competence provision, institutional rules reaffirm the well-established proposition that tribunals enjoy authority to determine their own jurisdiction. That is what competence-competence means, and that is all it means, at least under U.S. law. It does not remove a court's authority to make that determination if asked to do so. The meaning of competence-competence does not change merely because it has been incorporated in arbitral rules.

First Options itself creates a strong presumption that courts have primary responsibility to determine arbitrability – a presumption that can only be overcome by clear and unmistakable evidence to the contrary. If ordinary competence-competence language found in all modern arbitral rules and all modern arbitration laws were sufficient to rebut the *First Options* presumption, that presumption would cease to exist.

In short, general competence-competence language cannot constitute the clear and unmistakable evidence required by *First Options*.

This is exactly as it should be. The *First Options* framework is meant to protect the integrity of arbitral proceedings by enabling courts to determine independently whether parties agreed to arbitrate. Issues of arbitrability, such as the question of whether the parties agreed to arbitrate a particular dispute,

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[10] *See Actions Taken at the 92nd Annual Meeting*, ALI, http://2015annualmeeting.org/actions-taken/ (last visited Sep. 24, 2018).

go to basic consensual nature of arbitration. The Court has stated countless times that because "'arbitration is a matter of contract ... a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" *Howsam*, 537 U.S. at 83 (quoting *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960)). In *First Options*, this Court allowed parties, by way of exception, to delegate to a tribunal primary authority to determine whether the parties agreed to arbitrate a given dispute. But, precisely to ensure that consent of the parties is respected, the Court required a showing of that intention to be "clear and unmistakable." General competence-competence language, wherever found, cannot meet that test.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below holding that the issue of arbitrability was primarily for the court, although for reasons different than those relied on by the Fifth Circuit.

Respectfully submitted,

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No. 17-1272

In the Supreme Court of the United States

HENRY SCHEIN, INC. ET AL.,

Petitioners,

v.

ARCHER AND WHITE SALES, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the nation. The Chamber advocates for its members' interests before Congress, the executive branch, and the courts, and it regularly files *amicus* briefs in cases raising issues of importance to the business community. The Chamber frequently participates as *amicus curiae* in cases before this Court addressing questions involving the Federal Arbitration Act ("FAA")—including *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63 (2010), the Court's last case addressing agreements to delegate particular issues to an arbitrator.[1]

Many members of the Chamber and the broader business community have found that arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Accordingly, these businesses routinely include arbitration provisions containing so-called "delegation" provisions as standard features of their

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, and its counsel made a monetary contribution to its preparation or submission. The parties' blanket consents to *amicus* briefs have been filed with the Clerk's office.

business contracts. Based on the legislative policy reflected in the FAA and this Court's consistent endorsement of arbitration for the past half-century, Chamber members have structured millions of contractual relationships around arbitration agreements. Although this is a case that has businesses on both sides of the "v.", in the Chamber's experience, the business community has a broad and overarching interest in ensuring that the FAA is appropriately applied and that businesses can rely upon settled arbitration precedent.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question whether a court may refuse to enforce parties' agreements to delegate questions of arbitrability to arbitrators if the court perceives that the argument for the dispute's arbitrability is "wholly groundless." The FAA, and this Court's precedents interpreting it, supply a clear answer: a court may not overturn the parties' choice that the issue of arbitrability shall be decided by the arbitrator.

The FAA is unequivocal on this point: it requires a court to enforce the arbitration agreement as written, not to rewrite the agreement as the court sees fit. This Court has repeatedly enforced that statutory requirement, holding that courts may not refuse to enforce an agreement to arbitrate a particular question—including the question of arbitrability—based on the court's view of the merits of that question.

The "wholly groundless" exception to the FAA's text implied by the court of appeals here conflicts with this settled principle. Moreover, allowing that exception to stand would undermine the predictabil-

ity and certainty regarding the enforceability of arbitration agreements that Congress enacted the FAA to provide.

Countless businesses have entered into arbitration agreements—not just with other businesses, as in this case, but also with customers or employees—containing delegation provisions, which seek to avoid time-consuming litigation in court over the enforceability of arbitration agreements, litigation that can swallow the benefits of arbitration. The "wholly groundless" exception to agreements to arbitrate arbitrability vitiates those contractual commitments. The Court should reject the "wholly groundless" exception and reaffirm that courts must enforce arbitration agreements, including delegation provisions, as written.

ARGUMENT

I. Courts Have No Authority To Read A "Wholly Groundless" Exception Into The FAA.

A. The FAA requires enforcement of arbitration agreements as written.

The "principal purpose" of the FAA, as this Court has held time and again, is to "'ensur[e] that private arbitration agreements are enforced according to their terms.'" *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 344 (2011) (quoting *Volt Information Sciences, Inc.* v. *Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989)); see also *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57-58 (1995) (same). In providing that arbitration agreements are "valid, irrevocable, and enforceable" (9 U.S.C. § 2), Congress sought to "ensure that commercial arbitration agreements, like other contracts, are

enforced according to their terms and according to the intentions of the parties." *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 947 (1995) (citations and internal quotation marks omitted).

To that end, both Section 3 and Section 4 of the FAA require courts to adhere to the terms of the parties' arbitration agreement. Section 3 provides that if the parties validly agreed to arbitrate, the court must stay any litigation pending the completion of an arbitration proceeding "in accordance with the terms of the agreement." 9 U.S.C. § 3. And Section 4 in turn provides that a party that proves the existence of an arbitration agreement encompassing the dispute in question is entitled to "an order directing that such arbitration proceed *in the manner provided for in such agreement.*" 9 U.S.C. § 4 (emphasis added).

In short, as this Court recently observed, the FAA not only requires courts to enforce agreements to arbitrate, but "also specifically direct[s] them to respect and enforce the parties' chosen arbitration procedures." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1621 (2018) (citing Sections 3 and 4). Courts "cannot rely on * * * judicial policy concern[s]" to refuse to honor arbitration agreements as written. *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 270 (2009).[2]

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[2] If an arbitration agreement contains unfair procedural rules or unfair processes for selecting arbitrators, Section 2 of the FAA provides that those unfair terms are subject to invalidation under generally applicable unconscionability principles. See *Marmet Health Care Ctr., Inc.* v. *Brown*, 565 U.S. 530, 533-34 (2012). But as discussed below, if the parties have validly agreed to delegate questions of arbitrability to an arbitrator, then any such unconscionability challenges are for the arbitrator to decide.

Under the FAA, therefore, courts generally must enforce agreements to arbitrate, including agreements to arbitrate arbitrability. As this Court has explained, the parties are entitled to "specify by contract the rules under which that arbitration will be conducted." *Volt*, 489 U.S. at 479. Indeed, "procedure" is among the "many features of arbitration" that "the FAA lets parties tailor * * * by contract." *Hall Street Assocs., LLC* v. *Mattel, Inc.*, 552 U.S. 576, 586 (2008).

And that ability to tailor arbitration agreements includes the ability to choose whether disputes over arbitrability will be decided by a court or the arbitrator. See *First Options*, 514 U.S. at 943; see also *Rent-A-Center*, 561 U.S. at 70 ("An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other.").

The "wholly groundless" exception created by certain courts is incompatible with the framework just described. At bottom, the exception rests on the notion that, even when the parties have clearly agreed to delegate questions of arbitrability to an arbitrator, courts may decline to enforce that agreement on policy grounds or based on an assumption that the parties did not really mean what they wrote in their agreement.

The FAA does not permit such second-guessing. A court's role under the FAA is limited to determining whether the parties in fact agreed to delegate arbitrability questions to an arbitrator; if they did, the FAA requires that the agreement be enforced.

B. There is no legitimate basis for judicial creation of a "wholly groundless" exception.

The courts that have adopted a version of the "wholly groundless" exception have offered several reasons for doing so, but none is persuasive.

First, some courts have relied on the notion that "what must be arbitrated is a matter of the parties' intent." *Douglas* v. *Regions Bank*, 757 F.3d 460, 464 (5th Cir. 2014). These courts suggest that, when a court believes that the argument for an issue's arbitrability is "wholly groundless," the court can conclude that the party opposing arbitration "never intended that such arguments would see the light of day at an unnecessary and needlessly expensive gateway arbitration." *Ibid.* But this approach—which openly requires courts to evaluate the merits of the parties' arguments regarding the arbitrability of an issue—is barred by this Court's precedents.

The Court has previously explained that "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." *AT&T Technologies, Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986). That is so "even if [a claim] appears to the court to be frivolous" (*id.* at 649-50), because a court's obligation is to require arbitration of all claims that the parties agreed to arbitrate, "'not merely those which the court will deem meritorious'" (*id.* at 650 (quoting *United Steelworkers of Am.* v. *Am. Mfg. Co.*, 363 U.S. 564, 568 (1960)).

The same analysis applies to disputes about whether a particular issue is arbitrable. Once a court

has determined that the parties agreed to arbitrate issues of arbitrability, the court must enforce that agreement: it may not refuse on the ground that it is convinced that the proponent of arbitration cannot prevail—that would be an intrusion into the merits of the underlying question indistinguishable from the "frivolous[ness]" determination that this Court held improper in *AT&T Technologies*.

Moreover, speculating about whether the parties truly "intended" for certain arguments to be submitted to arbitrators is impermissible when delegation to the arbitrator is required by "the terms of the [parties'] agreement." 9 U.S.C. § 3. This Court has made clear that when the party resisting arbitration "[does] not contest the validity of the delegation provision in particular," the delegation provision must be enforced. *Rent-A-Center*, 561 U.S. at 74.

Second, some courts have relied on Section 3 of the FAA, which provides that a court must stay litigation in favor of arbitration "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement." 9 U.S.C. § 3. These courts have held that, if a court believes that the argument in favor of a dispute's arbitrability is "wholly groundless," "then it may conclude that it is not 'satisfied' under Section 3, and deny the moving party's request for a stay." *Qualcomm Inc.* v. *Nokia Corp.*, 466 F.3d 1366, 1371 (Fed. Cir. 2006).

But Section 3's plain language refutes that conclusion. It requires only that the court be "satisfied" that the dispute at hand is "referable to arbitration under [the parties'] agreement." 9 U.S.C. § 3. And in the context of disputes about arbitrability, that question depends upon whether (1) the parties agreed to

arbitrate arbitrability, and (2) the delegation provision itself is enforceable. If those conditions are met, then nothing in the text of the FAA or this Court's precedents authorizes a court to declare itself "unsatisfied" with sending a dispute to arbitration based on the court's view of the merits of the arbitrability issue.

Finally, the Fourth Circuit has suggested that the exception finds support in Federal Rule of Civil Procedure 11's prohibition of frivolous arguments. *Simply Wireless, Inc* v. *T-Mobile US, Inc.*, 877 F.3d 522, 528-29 (4th Cir. 2017). That suggestion is impossible to square with this Court's declaration in *AT&T Technologies* that "a court is not to rule on the potential merits of the underlying claims," "even if [a party's arguments] appear[] to the court to be frivolous." 475 U.S. at 649-50.

Moreover, providing parties resisting arbitration with "an entitlement" under Rule 11 to "invalidat[e] private arbitration agreements" that unquestionably delegate determinations of arbitrability to arbitrators "likely * * * would be an 'abridg[ment]' or 'modif[ication]' of a 'substantive right' forbidden to the Rules" under the Rules Enabling Act. *Am. Express Co.* v. *Italian Colors Rest.*, 570 U.S. 228, 234 (2013) (quoting 28 U.S.C. § 2072(b)). The Federal Rules similarly cannot override the FAA's mandate to enforce arbitration agreements according to their terms; only a "clear and manifest congressional command" in a federal statute can do that. *Epic Sys. Corp.*, 138 S. Ct. at 1624.[3]

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[3] To be sure, a court retains authority to impose Rule 11 sanctions if a motion to compel arbitration of an arbitrability dispute violates the stringent standards of that rule because a par-

The judicial creation of the "wholly groundless" exception, in short, conflicts directly with the text of the FAA and this Court's precedents interpreting it. The Court should reject this exception and adhere to its longstanding rule that the FAA requires enforcement of arbitration agreements as written.

II. The "Wholly Groundless" Exception Is Contrary To The FAA's Policy Favoring Predictability Of And Certainty About The Enforceability Of Arbitration Agreements.

The "wholly groundless" exception is not only unsupportable as a matter of law; it is contrary to the congressional policies embodied in the FAA. Recognizing such an exception would serve only to inject uncertainty into the enforcement of arbitration agreements and to facilitate the sort of "judicial hostility to arbitration agreements" that the FAA was meant to prevent.

A. The "wholly groundless" exception allows courts hostile to arbitration to nullify valid arbitration agreements.

The "wholly groundless" exception is harmful, first and foremost, because it empowers courts to disregard delegation provisions that were intended to minimize judicial involvement in assessing the enforceability of arbitration agreements.

The rules set forth in the FAA reflect Congress's objective to "'overcome judicial hostility to arbitration agreements.'" *Circuit City Stores, Inc.* v. *Adams*,

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ty's assertion that the agreement delegates arbitrability determinations to the arbitrator is frivolous. But courts cannot rely on Rule 11 to create a broader "wholly groundless" exception to the FAA's statutory mandate.

532 U.S. 105, 118 (2001) (quoting *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 272 (1995)). Under the FAA, once a court determines that a dispute is arbitrable, it *must* stay any litigation in court and compel the parties to arbitration. 9 U.S.C. §§ 3, 4.

These statutory requirements are meant to ensure that valid agreements to arbitrate will be enforced even if a court might otherwise possess a hostile attitude toward arbitration. But the "wholly groundless" exception undermines this protection against anti-arbitration animus by allowing courts to take the question of arbitrability out of the hands of the arbitrator despite the parties' "'clear and unmistakable'" delegation of arbitrability to the arbitrator. *Rent-A-Center*, 561 U.S. at 69 n.1 (quoting *First Options*, 514 U.S. at 944) (brackets omitted).

The Fifth Circuit has suggested that the "wholly groundless" exception is harmless because it applies only when the argument for arbitrability is so "groundless" that there is no point in subjecting the parties to an "unnecessary and needlessly expensive gateway arbitration." *Douglas*, 757 F.3d at 464. But the "groundless" standard provides no meaningful check on courts' discretion, because what constitutes a "groundless" argument is very much in the eye of the beholder.

This case illustrates the point: petitioners' argument as to why the dispute here is arbitrable rests on a plausible reading of the contract—as demonstrated by the fact that the magistrate judge who originally considered the question held that the question of arbitrability should be submitted to the arbitrator. Pet. App. 41a-42a. But the district court reached the opposite conclusion, holding that the

contract unambiguously ruled out petitioners' interpretation. *Id.* at 28a.

The problem is evident: it may be trivially easy for a court that is opposed to moving a dispute to arbitration to assert that the parties' contract "clearly" precludes arbitration of a particular kind of dispute, even where there is room for debate on the issue. As long as this easy end run around the FAA is available to courts, at least some courts will make use of it to frustrate the statute's purposes and avoid enforcing valid arbitration agreements.

The availability of the "wholly groundless" exception is troubling for an additional reason: the doctrine assumes that arbitrators will either fail to correctly decide questions of arbitrability or that arbitrators cannot be trusted to resolve such disputes quickly and efficiently. That "suspicion of arbitration" has "fallen far out of step with" this Court's "strong endorsement of the federal statutes favoring this method of dispute resolution." *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989).

B. Businesses and consumers have good reasons for agreeing to arbitrate questions of arbitrability.

The decision below should also be reversed for an additional reason: affirmance would have significant and deleterious practical consequences, effectively rewriting millions of contracts and severely undermining the interests that arbitration was designed to serve.

Relying on this Court's precedents interpreting the FAA, many businesses have entered into contracts with customers, employees, or

counterparties that seek to maximize the efficiencies of arbitration by delegating threshold questions of arbitrability to the arbitrator. These businesses have done so because they consider arbitration to be a fair and effective way to resolve the full range of contract disputes, including questions of arbitrability, and because resolving these disputes in arbitration can help avoid a slow and costly detour through the courts.

By making every dispute over arbitrability reviewable by courts, the "wholly groundless" exception denies contracting parties this flexibility and "breed[s] litigation from a statute that seeks to avoid it." *Allied-Bruce*, 513 U.S. at 275. Before a dispute could proceed to arbitration, a party resisting arbitration would be able to instigate a judicial proceeding to determine whether the argument in favor of arbitrability was "wholly groundless," which—depending on the nature of the arguments made—could involve burdensome discovery, formal hearings, and time-consuming interlocutory appeals.

Businesses that have entered into millions of contracts premised on "the relative informality of arbitration" and procedures "more streamlined than federal litigation" (*14 Penn Plaza*, 556 U.S. at 269) would nonetheless be unable to avoid civil litigation. This lawsuit is a case in point: despite having agreed to arbitrate any questions of arbitrability with respondent, petitioners have been tied up in litigation for years.

That result thwarts contracting parties' reasonable expectations under this Court's precedents. And by injecting "uncertainty as to procedure and outcome" into the decision whether to agree to arbitrate, the "wholly groundless" exception creates a perceived

"risk [of] using arbitration clauses due to the uncertainty present." Gregory C. Cook & A. Kelly Brennan, *The Enforceability of Class Action Waivers in Consumer Agreements*, 40 UCC L.J. 331, 333, 348 (2008). The consequent deterrence of the use of arbitration frustrates the FAA's basic purpose.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 2018

No. 17-1272

IN THE

Supreme Court of the United States

HENRY SCHEIN, INC., *ET AL.*,

Petitioners,

v.

ARCHER AND WHITE SALES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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August 20, 2018

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation (NELF) seeks to present its views, and the views of its supporters, on the issue whether the Federal Arbitration Act (FAA) permits a court to decline to enforce an agreement to arbitrate disputes over threshold issues of arbitrability, such as when the court concludes that a party's claim of arbitrability is "wholly groundless."[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977, and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and small businesses located primarily in the New England region.

NELF is committed to the use of arbitration as a viable contractual alternative to litigation for the resolution of disputes. In this respect, NELF is committed to the FAA's core principle that arbitration agreements must be enforced according

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[1] Pursuant to Supreme Court Rule 37.6, amicus states that no counsel for a party authored its amicus brief in whole or in part, and no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Rule 37.2(a), amicus states that counsel of record for each party has filed a blanket consent letter with the Court for the filing of amicus briefs.

to their terms. Under the FAA, courts have no discretion to disregard or undermine in any way the parties' valid contractual arrangement for the resolution of their disputes by arbitration, including threshold disputes concerning the arbitrability of claims. The FAA does not permit any judicial interference with the arbitrator's exercise of his or her contractually delegated powers.

In addition to this amicus brief, NELF has filed several other amicus briefs in this Court in cases arising under the FAA, arguing for the enforcement of arbitration agreements according to their terms.[2]

For these and other reasons discussed below, NELF believes that its brief will assist the Court in deciding the issue presented in this case.

SUMMARY OF ARGUMENT

The FAA requires a court to enforce a valid agreement to arbitrate threshold disputes concerning the arbitrability of claims. Such an agreement is "[a] written provision . . . to settle by arbitration a controversy," 9 U.S.C. § 2, and it therefore must be enforced, "save upon such grounds as exist at law or in equity for the

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[2] *See, e.g., DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013); *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

revocation of any contract . . . ." *Id.* Since no such contractual challenge was raised in this case, the FAA required the Fifth Circuit to enforce the parties' agreement that the arbitrator would decide their dispute concerning the scope of their arbitration agreement.

The FAA does not permit a court to usurp the arbitrator's contractually delegated power to decide threshold questions of arbitrability, as the Fifth Circuit did here when it evaluated the merits of such a dispute under its "wholly groundless" standard. Once the parties have agreed to arbitrate disputes over arbitrability, courts no longer have the power to adjudicate those disputes in any way. Indeed, the FAA was enacted to abrogate the ancient "ouster" doctrine, under which courts refused to enforce arbitration agreements when they believed that those agreements wrongfully deprived them of their jurisdiction. In essence, the Fifth Circuit's "wholly groundless" standard is an impermissible attempt to revive this dead and buried doctrine.

ARGUMENT

WHEN PARTIES HAVE ENTERED INTO A VALID AGREEMENT TO ARBITRATE THRESHOLD DISPUTES OVER ARBITRABILITY, THE FEDERAL ARBITRATION ACT DOES NOT PERMIT A COURT TO EVALUATE THE MERITS OF THOSE ARBITRABLE DISPUTES, SUCH AS UNDER THE FIFTH CIRCUIT'S "WHOLLY GROUNDLESS" STANDARD.

At issue is whether the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (FAA), permits a court to decline to enforce a valid agreement to arbitrate threshold disputes over arbitrability when the court believes that there is no merit to such an arbitrable dispute. The Fifth Circuit did so here under its "wholly groundless" standard. The Fifth Circuit was wrong.

In the dealer agreement between the petitioners, Henry Schein, Inc., *et al.* (Schein), and the respondent, Archer and White Sales, Inc. (Archer), the parties agreed to arbitrate "[a]ny dispute arising under or related to this Agreement (except for actions seeking injunctive relief . . .), . . . in accordance with the arbitration rules of the American Arbitration Association [(AAA)]." Appendix (App.) 3a. The AAA rules, in turn, provided that "the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, *scope* or validity of the arbitration agreement." App. 7a (emphasis added). That is, the parties agreed to a

"delegation provision[, which] is an agreement to arbitrate threshold issues concerning the arbitration agreement." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68 (2010). *See also id.* at 69 ("[Q]uestions of arbitrability may be delegated to the arbitrator, so long as the delegation is clear and unmistakable.") (citation and internal punctuation marks omitted); App. 7a.

Notwithstanding the parties' arbitration agreement, Archer brought an antitrust claim against Schein in federal court, and Schein moved to compel arbitration. App. 1a-2a. A dispute then arose over the scope of the exception for "actions seeking injunctive relief" contained in the parties' arbitration agreement. App. 2a. Instead of enforcing the parties' delegation provision and submitting this threshold dispute to the arbitrator, the Fifth Circuit decided to evaluate the merits of that arbitrable dispute for itself. App. 11a-16a. The court concluded that Schein's claim of arbitrability was "wholly groundless," and it therefore allowed Archer to proceed with its antitrust claim in federal court. App. 7a, 11a-16a, 45a. This Court has since stayed the federal court proceedings pending its decision in the case.

The Fifth Circuit erred because the FAA required the lower court to enforce the parties' delegation provision, by letting the *arbitrator* decide the parties' arbitrable dispute over the scope of their arbitration agreement. This is because a delegation provision is "[a] *written provision* in . . . a contract evidencing a transaction involving commerce *to settle by arbitration a controversy*

thereafter arising out of such contract . . . ." 9 U.S.C. § 2 (emphasis added).[3] *See also Rent-A-Center*, 561 U.S. at 68-70 (discussing same). Therefore, the provision must be enforced, "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Since Archer did not raise any such contract defense, the Fifth Circuit was required under the FAA to "place [this] arbitration agreement[] on an equal footing with other contracts . . . and enforce [it] according to [its] terms . . . ." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

After all, "[a]n agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Rent-A-Center*, 561 U.S. at 70. Therefore, the FAA required the Fifth Circuit to enforce the parties' delegation provision by "mak[ing] an order directing the parties to proceed to arbitration in accordance with the terms of the[ir] agreement." 9 U.S.C. § 4.

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[3] Section two of the FAA provides, in relevant part:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

Simply put, the FAA does not permit a court to usurp the arbitrator's contractually delegated power to resolve a gateway dispute, such as by evaluating the merits of that dispute as the Fifth Circuit did under its "wholly groundless" standard. Once the parties have agreed to arbitrate disputes over arbitrability, courts no longer have the power to adjudicate those disputes in any way. The Fifth Circuit should have borne in mind that "Congress enacted the FAA in response to widespread judicial hostility to arbitration." *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 232 (2013).

Indeed, the FAA was enacted to abrogate the ancient "ouster" doctrine, under which courts refused to enforce arbitration agreements when they believed that those agreements wrongfully deprived them of their exclusive jurisdiction to adjudicate certain disputes.[4] "To the extent that the ancient 'ouster' doctrine continue[s] to impede specific enforcement of arbitration agreements, § 2 of the FAA, the Act's centerpiece provision, . . . directly attend[s] to the problem." *Vaden v. Discover Bank*, 556 U.S. 49, 64 (2009) (citations and internal quotation marks omitted).

In essence, the Fifth Circuit's "wholly groundless" standard is an impermissible attempt to revive this dead and buried ouster doctrine. Specifically, the lower court refused to relinquish

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[4] "The principal thrust of the FAA is to abolish the ouster doctrine, the ancient rule that arbitration clauses improperly deprived courts of their jurisdiction." David Horton, *The Mandatory Core of Section 4 of the Federal Arbitration Act*, 96 Va. L. Rev. In Brief 1, 5 (2010).

control over the parties' arbitrable dispute and instead decided that it retained the independent power to evaluate the merits of that dispute for itself. The FAA, however, does not permit such judicial interference with the arbitrator's exercise of her contractually delegated powers.

In sum, the FAA does not permit a court to adjudicate an arbitrable dispute, including an arbitrable dispute over the scope of an arbitration agreement. Instead, the court must allow the arbitrator to decide that dispute. Therefore, the Fifth Circuit's decision should be reversed, and Archer should be compelled to arbitrate the parties' dispute over the scope of their arbitration agreement, under 9 U.S.C. § 4.

CONCLUSION

For the reasons stated above, the judgment of the Fifth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does the FAA require a court to compel arbitration of an issue of "arbitrability" when the assertion that the dispute before the court is subject to arbitration is wholly groundless?

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., is a consumer advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and the courts. Public Citizen works on a wide range of issues, including enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen has a longstanding interest in issues concerning the enforcement of mandatory predispute arbitration agreements, and it has appeared as amicus curiae in many cases involving such issues in this Court and other federal and state courts.

SUMMARY OF ARGUMENT

Whether courts or arbitrators decide if the parties have agreed to arbitrate a particular dispute "can make a critical difference." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995). In recognition of the potential importance to the parties of this "who decides" question, and to carry out the aims of the Federal Arbitration Act (FAA), this Court has held that it is presumptively up to the courts to decide issues of "arbitrability." Only if the parties have clearly and unmistakably agreed to delegate arbitrability issues to the arbitrators are courts authorized to enforce that agreement and send genuinely disputed issues of arbitrability to the arbitrators for decision in the first instance.

But what if there is no genuine dispute over arbitrability because the assertion that a particular dispute

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae or its counsel made a monetary contribution to preparation or submission of the brief. Both parties have filed blanket consents to submission of amicus briefs.

is arbitrable is wholly groundless, yet one party nonetheless insists that the court compel arbitration of its baseless assertion that a dispute initiated by the other party in court is subject to arbitration? That question is the one posed by this case.

Under such circumstances, where who decides arbitrability cannot make a "critical difference" to the ultimate outcome because only one answer is possible, the FAA does not require arbitration of the arbitrability issue. Indeed, read as a whole—as it must be—the FAA requires the opposite. The outcome of any arbitration that rested on the arbitrators' wholly groundless arbitrability determination would be subject to vacatur under section 10(a)(4) of the FAA, 9 U.S.C. § 10(a)(4), because the arbitrators would have "exceeded their powers" in asserting authority over the dispute without any contractual basis. The FAA cannot be read to require that arbitration be compelled where the Act would require vacatur of any outcome other than a decision by the arbitrators not to hear the matter.

This conclusion follows not only from the general principle that the law does not require futile and self-defeating actions—including resort to pointless procedures that can have only one permissible result—but also from the FAA's own foundational principle that parties may be compelled to arbitrate "only those disputes ... that the parties have agreed to submit to arbitration." *First Options*, 514 U.S. at 943. Although parties may agree to arbitrate issues of arbitrability, such agreements are not reasonably understood to require arbitration of wholly groundless assertions of arbitrability that could be accepted by the arbitrators only if they exceeded their powers by entirely disregarding the parties' agreement. No party can be said to have

consented to allow arbitrators to consider whether to exceed their powers merely by agreeing to allow them to resolve genuinely disputed matters of arbitrability.

ARGUMENT

I. The FAA does not require courts to compel arbitration when the arbitrators would exceed their powers if they asserted authority over a dispute.

The premise of the question presented is that the assertion that the underlying dispute in this case is subject to arbitration under the arbitration agreement at issue is "wholly groundless." Pet. i. That is, no reasoned decisionmaker legitimately attempting to interpret the agreement could conclude that the claims of respondent Archer and White Sales, Inc., against petitioners Henry Schein, Inc., and others are arbitrable under that agreement. Nonetheless, because Henry Schein contends that the arbitration agreement delegates all questions of arbitrability to the arbitrator (a contention that is itself disputed, Pet. App. 10a, and not before this Court), it asserts that petitioners are entitled to an order compelling arbitration so that their groundless contention that the claims in this case are subject to arbitration can be considered by an arbitrator. The FAA does not require that illogical result.

A. The FAA would require vacatur of an arbitral decision resting on a wholly groundless arbitrability determination.

Henry Schein's argument purports to rest on two propositions, established by this Court's decisions: (1) that provisions delegating questions of arbitrability to an arbitrator are treated as separate arbitration provisions severable from the larger arbitration provisions

of which they are a part; and (2) that section 2 of the FAA, 9 U.S.C. § 2, provides for enforcement of such agreements. *See Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010). According to Henry Schein, it necessarily follows that if an arbitration agreement contains a valid delegation clause, even an entirely baseless assertion by a party to the agreement (or perhaps even a non-party) that a claim asserted against it is subject to arbitration requires a court to compel arbitration under section 4 of the Act, 9 U.S.C. § 4.

Henry Schein's argument founders on one of the most fundamental precepts of statutory interpretation: Statutory construction is a "holistic endeavor," *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 652 (2013) (citation omitted), in which a court must consider the requirements of particular statutory provisions "in their context and with a view to their place in the overall statutory scheme," *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (citation omitted). Thus, courts must read "the particular statutory language at issue" together with "the language and design of the statute as a whole" and "its object and policy." *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991) (citations omitted). Only by examining "the provisions of the whole law" can a court arrive at a result that "produces a substantive effect that is compatible with the rest of the law." *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 985 (2017) (citations omitted). The courts' "duty, after all, is 'to construe statutes, not isolated provisions.'" *King*, 135 S. Ct. at 2489.

Here, consideration of Henry Schein's argument in "the broader context of the statute as a whole," *FCC v. AT&T Inc.*, 562 U.S. 397, 407 (2011) (citation omitted), reveals it to be self-defeating. Reading section 4 of the

statute to require a court to compel arbitration of a wholly groundless claim of arbitrability would be nonsensical because a separate provision of the statute, section 10(a)(4), would require the court to overturn the result of the arbitration if the arbitrators accepted the groundless claim that the parties' underlying dispute was arbitrable and proceeded to decide it.

Specifically, section 10(a)(4) authorizes a court to vacate an arbitration award "where the arbitrators exceeded their powers" in issuing it. 9 U.S.C. § 10(a)(4). Purporting to resolve a matter outside the scope of the parties' arbitration agreement is the classic example of arbitrators exceeding their powers. *See BG Group, PLC v. Repub. of Argentina*, 572 U.S. 25, 32, 44–45 (2014). Although an agreement delegating authority to arbitrators to decide questions of arbitrability establishes that they do not exceed their authority merely by considering an arbitrability question, such a delegation agreement does not "confer[] authority on the arbitrators to exceed the terms of the [arbitration agreement] itself." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 n.8 (2010). The arbitrators remain bound by the arbitration clause's limits on their substantive authority. And although their determination whether a particular dispute is subject to arbitration is given "considerable leeway" by a court, *First Options*, 514 U.S. at 943, that determination remains reviewable under section 10(a)(4) to determine whether the arbitrators exceeded their powers in reaching their decision, *see id.*; *see, e.g.*, *BG Group*, 572 U.S. at 44–45.

The determination whether arbitrators have exceeded their powers in concluding that a particular dispute falls within the scope of an arbitration agreement depends on whether they have "stra[yed] from

interpretation and application of the agreement or otherwise effectively dispens[ed] their own brand of ... justice." *BG Group*, 572 U.S. at 45 (quoting *Stolt-Nielsen*, 559 U.S. at 671, and *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001); internal quotation marks omitted). A decision by the arbitrators that the parties must arbitrate a particular dispute exceeds the arbitrators' power absent "a contractual basis for concluding that the [parties] *agreed* to do so." *Stolt-Nielsen*, 559 U.S. at 684. The arbitrators' decision must be set aside if they are not "even arguably construing or applying the contract and acting within the scope of [their] authority." *Garvey*, 532 U.S. at 509 (citation omitted); *accord, e.g.*, *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 (2013); *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987).

Where the assertion that a dispute is within the scope of an arbitration agreement is wholly groundless, a court would be required to overturn a decision by the arbitrators to take jurisdiction over that dispute because such a decision would "lack[] *any* contractual basis." *Oxford Health*, 569 U.S. at 571. In asserting jurisdiction over a dispute in the absence of a colorable argument that it fell within the arbitration agreement's scope, the arbitrators would have "abandoned their interpretive role" and "strayed from [their] delegated task of interpreting a contract." *Id.* at 571, 572. Such a decision would exceed the arbitrators' powers within the meaning of section 10(a)(4) "because it was not—indeed, could not have been—'based on a determination regarding the parties' intent.'" *Id.* at 571 (quoting *Stolt-Nielsen*, 559 U.S. at 673, n.4). A decision to accept a wholly groundless claim of arbitrability would thus require vacatur under section 10(a)(4).

Construing the FAA to require arbitration of a wholly groundless issue of arbitrability would thus create two possibilities: The arbitrators would properly reject the claim of arbitrability and return the case to the courts, or they would exceed their authority by determining without any contractual basis that the claim was arbitrable. In the latter case, the result would be an arbitration proceeding whose outcome would ultimately be subject to vacatur by the court under section 10(a)(4).

B. The FAA does not require arbitration of an arbitrability issue that the arbitrators could permissibly resolve only against arbitration.

As a general matter, "[t]he law does not require the doing of a futile act." *Ohio v. Roberts*, 448 U.S. 56, 74 (1980), *overruled on other grounds*, *Crawford v. Washington*, 541 U.S. 36 (2004). "Good judicial administration is not furthered by insistence on futile procedure." *Wade v. Mayo*, 334 U.S. 672, 681 (1948).

Thus, this Court has often read statutory schemes not to require pointless proceedings. In the realm of administrative law, for example, the Court has held that a statutory requirement that an agency make a decision "after a hearing" does not require an actual hearing when "a hearing would be futile and wasteful" because the matter is "concededly beyond [the agency's] competence to decide." *Weinberger v. Salfi*, 422 U.S. 749, 767 (1975). Similarly, the Court has held that statutory requirements of administrative exhaustion may be excused on grounds of futility, *see, e.g.*, *Honig v. Doe*, 484 U.S. 305, 327 (1988), except in instances where they are jurisdictional, *see Weinberger*, 422 U.S. at 766.

Of particular relevance here, courts have held that matters ordinarily requiring decision in the first instance by another body—whether an agency or a court—need not be remanded to that body for decision when such a remand "would be an idle and useless formality." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (declining to remand to agency where "[t]here is not the slightest uncertainty as to the outcome" and "[i]t would be meaningless to remand"); *see also Already, LLC v. Nike, Inc.*, 568 U.S. 85, 100 (2013) (declining to remand to lower courts where "a remand would serve no purpose" because only one outcome was possible).

Importantly, courts have applied this principle not just in cases, like *Wyman-Gordon*, where the courts had no doubt about how the agency or lower court would rule if the matter were remanded. Courts have applied it as well in cases, like this one, where it was clear that a remand could have only one *permissible* result, and any other outcome would ultimately require vacatur of the lower tribunal's ruling. For example, in *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532 (D.C. Cir. 1992) (Sentelle, J.), the D.C. Circuit found that an agency had failed to provide an explanation for its ruling that was adequate under governing case law. Rather than remanding for further explanation on the point, however, the court held that "a remand would be futile ... as only one disposition is possible as a matter of law." *Id.* at 1539. Therefore, the court "retain[ed] and decide[d] the issue" itself. *Id.* As the court explained, sending the case to another decisionmaker for a ruling that would inevitably be overturned if it did not conform to the only legally permissible outcome would "convert judicial review ... into a

ping-pong game." *Id.* (quoting *Wyman-Gordon*, 394 U.S. at 766–67 n.6).

Nothing in the FAA requires courts to depart from this common-sense principle and instead to commence a judicial ping-pong volley by sending an issue of arbitrability to arbitration under circumstances where a decision by the arbitrators to hear the matter will inevitably result in vacatur of their award. To be sure, this Court has often stated that the FAA "establishes 'a liberal federal policy favoring arbitration agreements.'" *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). "But no legislation pursues its purposes at all costs," *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987)—not even the FAA. Compelling arbitration in a case where the arbitrators, if they reached the merits, would necessarily exceed their authority and subject their decision to vacatur under section 10(a)(4) would pursue a policy favoring arbitration far beyond the limits expressly established by the Act itself.

As this Court has stated, the FAA "cannot be held to destroy itself." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343 (2011). Requiring arbitration under section 4 of the FAA in a case where section 10(a)(4) would require vacatur if the arbitrators decided to hear the case would read the FAA to require a quixotic and counterproductive act that runs directly contrary to the FAA's objective of providing "efficient, streamlined procedures tailored to the type of dispute." *Id.* at 344.

II. Compelling arbitration of a groundless claim of arbitrability would be contrary to the principle that FAA arbitration is a matter of consent.

Not only would reading the FAA to require arbitration of wholly groundless claims of arbitrability make nonsense of the Act, but it would do nothing to advance—would, indeed, contradict—the FAA's actual "proarbitration" policy. As this Court has explained:

> [T]his "policy" is merely an acknowledgment of the FAA's commitment to "overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts." *Volt* [*Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*], 489 U.S. [468,] 478 [(1989)] (internal quotation marks and citations omitted). Accordingly, we have never held that this policy overrides the principle that a court may submit to arbitration "only those disputes ... that the parties have agreed to submit." *First Options*, 514 U.S., at 943; see also *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) ("[T]he FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties") ....

Granite Rock Co. v. Int'l B'hood of Teamsters, 561 U.S. 287, 302 (2010).

Declining to compel arbitration of matters that the parties have excluded from arbitration so unequivocally that any argument for arbitrating them is wholly groundless is fully consistent with the FAA's core principle that "[a]rbitration is strictly 'a matter of consent.'" *Id.* at 299 (quoting *Volt*, 489 U.S. at 479). Indeed, under ordinary circumstances, the FAA's

requirements prohibit courts from ordering arbitration of issues that they independently determine to fall outside the scope of arbitration. *See id.* at 299–300; *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002); *First Options*, 514 U.S. at 943.

The Court has recognized an exception to this rule for cases where the parties have clearly and unmistakably agreed to delegate questions of arbitrability to the arbitrators. *See Rent-A-Center*, 561 U.S. at 69 n.1; *Howsam*, 537 U.S. at 83; *First Options*, 514 U.S. at 944–45. The Court, however, has carefully limited the circumstances in which arbitration of arbitrability is required to those where the parties' agreement is clear and unmistakable—a standard that this Court has said "reverses" the ordinary "presumption" that disputes arguably within the scope of an arbitration agreement are arbitrable. *First Options*, 514 U.S. at 945. This limitation reflects the Court's recognition that agreements in which "arbitrators decide the scope of their own powers" are outside the normal expectations of the parties and that enforcing them too readily risks "too often forc[ing] unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *Id.* at 945; *see also Howsam*, 537 U.S. at 83–84 (describing the issues subject to *First Options*' clear-and-unmistakable standard as ones "where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate").

These same considerations remain present even when parties have, or assertedly have, agreed to allow the arbitrators to determine the scope of their

authority under an arbitration agreement.[2] The reasonable expectation of parties to such an agreement is that they have agreed to allow the arbitrators to decide *arguable* questions as to the arbitrability of particular matters, not that they have consented to allow the arbitrators to consider *wholly groundless* assertions that they may decide a dispute under the parties' agreement. In particular, where the parties have expressly agreed to deny the arbitrators authority over a specific type of dispute (as they did here with respect to actions seeking injunctive relief), "one naturally would think that they did *not* want the arbitrators" to consider grabbing the power to decide such matters without any basis in the contract. *First Options*, 514 U.S. at 946. Declining to compel arbitration of wholly groundless claims of arbitrability respects rather than frustrates the reasonable expectations of the parties.

The assertion that courts should compel parties to take any wholly groundless action is an unusual one requiring an unusually powerful justification. The FAA provides no such justification. Read as a whole, its provisions foreclose rather than require orders compelling parties to arbitrate wholly groundless assertions that a dispute is arbitrable.

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[2] Again, whether the parties here agreed to arbitrate the question of arbitrability at issue remains disputed, was not resolved below, and is not included in the question presented here.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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No. 17-1272

In The
Supreme Court of the United States

HENRY SCHEIN, INC., *ET AL.*,

Petitioners,

v.

ARCHER AND WHITE SALES, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICUS CURIAE BRIEF OF ANTHONY MICHAEL SABINO IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Federal Arbitration Act permits a court to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes the claim of arbitrability is "wholly groundless."

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INTEREST OF *AMICUS CURIAE*

This *amicus curiae* is a law professor with expertise in arbitration generally, securities arbitration, commercial law, and commercial arbitration. Furthermore, this *amicus curiae* has represented parties in arbitration proceedings, frequently chairs arbitrations for the Financial Industry Regulatory Authority and other bodies, and regularly lectures on the precise topics found in the pending controversy. This case addresses the interpretation of the Federal Arbitration Act, implicates the enforcement of agreements to arbitrate, and, hence, the proper conduct of arbitration proceedings in a wide variety of fora. This *amicus curiae* has a professional and scholarly interest in the proper application and development of the law in this domain.[1]

STATEMENT

This *amicus curiae* respectfully adopts, in relevant part, the Statement of Facts set forth by the Petitioners herein, Henry Schein, Inc., *et al.* ("Petitioners").

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record received timely notice of the intent to file this brief, as required by Supreme Court Rule 37.3(a). Petitioners and Respondent timely filed blanket consents to the filing of any and all briefs of *amici curiae*, whether in support of either or neither party.

SUMMARY OF ARGUMENT

The question presented must be answered in the negative, for reason of the text of the Federal Arbitration Act, the strong federal policy favoring arbitration, and the lengthy and consistent line of precedents upholding that ideal. The "wholly groundless" theorem is unsupported by the statutory regime which empowers arbitration, it frustrates the strong federal policy favoring arbitration, and the doctrine cannot be reconciled with the Court's jurisprudence, which for decades now has robustly upheld the enforceability of agreements to arbitrate. As with other impediments to arbitration, the "wholly groundless" theorem should be eradicated or at least be subjected to a limiting principle.

ARGUMENT

I. THE "WHOLLY GROUNDLESS" THEOREM HAS NO BASIS IN THE TEXT OF THE FEDERAL ARBITRATION ACT.

Since 1925, arbitration has been regulated, and, moreover, encouraged, by the Federal Arbitration Act. 9 U.S.C. §§ 1, *et seq.* ("FAA"). The FAA explicitly directs the courts to enforce agreements to arbitrate, and empowers them to do so by a variety of means.

Foremost in the statutory scheme is Section 2, the "primary substantive provision of the Act." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). The statute mandates that

a written provision in a contract which calls for the arbitration of controversies "*shall* be valid, irrevocable, and enforceable." 9 U.S.C. § 2 (emphasis supplied). *See Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 474 (1989). It is noteworthy that the proviso is stated in the imperative "shall," and not the permissive "may" or similar.

Subsequent portions of the FAA also unmistakably work towards the goal of enforcing agreements to arbitrate. *See* 9 U.S.C. § 3 (providing for a stay of proceedings for a matter referable to arbitration), § 4 (supplying jurisdiction to compel arbitration), and § 9 (establishing a mechanism for confirming and enforcing an arbitration award). *See also Volt*, *supra*, 489 U.S. at 474 (analyzing Sections 2 and 4). In sum and substance, every aspect of the FAA supports the enforcement of agreements to arbitrate. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) ("*Concepcion*").

The Court has repeatedly declared the aim of the FAA is to ensure private agreements to arbitrate are enforced according to their terms. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (quotation omitted). The Court has frequently held the FAA places agreements to arbitrate on "an equal footing with other contracts." *Concepcion*, *supra*, 563 U.S. at 339 (quotations omitted), *citing Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). *See also Volt*, *supra*, 489 U.S. at 474, 478.

Most recently, the Court has declared that the FAA safeguards arbitral accords from "judicial interference." *Epic Systems Corp. v. Lewis*, 584 U.S. ___, ___, *slip op.* at 3 (No. 16-285) (May 21, 2018). *See also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) (the plain language of the Act evinces a clear legislative intent to prohibit judicial obstructionism to arbitration). As the most recent addition to the pantheon of the Court's arbitration jurisprudence, *Epic* confirms that the statutory components of the FAA constitute a cohesive scheme which "require[s] courts to respect and enforce agreements to arbitrate." *Epic*, *supra*, *slip op.* at 5.

Quite telling is the closing paragraph of *Epic*, wherein the Court characterizes the statutory regime as a solemn command from Congress "that arbitration agreements . . . must be enforced as written." *Id.*, *slip op.* at 25.

One final aspect of the FAA must be considered for purposes of the case at bar. Section 2 of the FAA contains a "savings" clause, which can render an agreement to arbitrate unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This subpart leaves intact generally applicable defenses to contract enforcement, such as fraud, duress, and unconscionability, as proper grounds for declining to enforce an arbitration agreement. *Concepcion*, *supra*, 563 U.S. at 339 (quotation and citation omitted). The savings clause is consistent with the law's intent to place arbitral accords on the same footing as ordinary contracts. *See id.*

To be certain, the Court has carefully cabined Section 2's savings clause, ruling that it does not evince any intent to preserve judicial constructs "that stand as an obstacle to the FAA's objectives." *Id.* at 343 (invalidating a state law rule purporting to make agreements to arbitrate unenforceable). Doctrines which apply solely to agreements to arbitrate or derive their meaning from the fact that the underlying pact calls for arbitration are not salvaged by this statutory subcomponent. *Id.* at 339. *See also Epic*, *supra*, *slip op.* at 1-2 (Thomas, J., concurring) (the sole basis for setting aside an agreement to arbitrate are those defenses concerning the formation of the underlying arbitral accord).

In consideration of all the above, the "wholly groundless" theorem finds no support within the FAA. It is unmoored from the statutory text. Indeed, the doctrine is antithetical to the statutory regime, for it undercuts the overriding legislative command that agreements to arbitrate *shall* be valid, irrevocable, and enforceable.

Nor does the "wholly groundless" theorem find support within the Court's precedents expounding upon the text of the FAA. Indeed, the doctrine constitutes the very type of judicial meddling which the Court has repeatedly, and even recently, declared is forbidden by the statutory regime.

Lastly, the "wholly groundless" theorem finds no refuge in the savings clause of Section 2. The doctrine is not a traditional contract defense preserved by the

statutory caveat. In truth, it is the type of judicial mechanism which the Court's precedents have excluded from Section 2's safe harbor.

It is respectfully submitted by this *amicus* that the "wholly groundless" theorem has no basis in the FAA. Lacking foundation in the statutory scheme, the doctrine should be eliminated or at least be subjected to a limiting principle.

II. THE "WHOLLY GROUNDLESS" THEOREM NULLIFIES CONTRACTUAL TERMS, AND DEPRIVES PARTIES OF THE BENEFIT OF THEIR BARGAIN.

It is a "fundamental principle that arbitration is a matter of contract." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010). *See also American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 233 (2013). In relation thereto, it has long been a bedrock principle of this Court's jurisprudence that arbitration is a matter of consent, not coercion. *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 681 (2010), *quoting Volt*, *supra*, 489 U.S. at 479 (quotations omitted). Precisely for these reasons, the Court's arbitration landmarks have long affirmed that "the FAA requires courts to honor parties' expectations." *Concepcion*, *supra*, 563 U.S. at 351.

Agreements to arbitrate must therefore be rigorously enforced. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985). As with any other contract, the parties' intentions control. *Mitsubishi Motors Corp. v.*

Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985). The proper role of the courts is to "give effect to the contractual rights and expectations of the parties," as gleaned from the arbitral accord. *Volt*, *supra*, 489 U.S. at 479.

Reflecting that arbitral pacts are just like ordinary contracts, it has long been acknowledged that parties are generally free to shape their agreements to arbitrate as they see fit. *Mastrobuono*, *supra*, 514 U.S. at 57. *See also Concepcion*, *supra*, 563 U.S. at 344 ("The point of affording parties discretion in designing arbitration processes" is that it empowers them to adopt the rules and procedures they deem best suited to their particular needs.). Thus, in yet another hallmark of the Court's arbitration jurisprudence, it is well known that parties may categorize the controversies they wish to submit to the arbitrator for resolution. *See generally Mitsubishi Motors*, *supra*, 473 U.S. at 628 (parties may choose to include or exclude statutory claims from arbitration, but are bound to that choice, once it is made).

The "wholly groundless" theorem cannot stand before these precedents, both generally and in the context of the instant case. As a general matter, the doctrine upsets the maxim that, like any contract, an agreement to arbitrate is to be rigorously enforced. Contrary to the axioms set forth above, the "wholly groundless" theorem substitutes judicial intervention for contract stipulations, consent, and the expectations of the parties.

Specific to the matter before the Court, the salient (and, arguably, dispositive) contractual language at the heart of the instant controversy unequivocally states that "[a]ny dispute arising under or related to this Agreement . . . shall be resolved by binding arbitration." The sole exemptions from this plainspoken directive are actions for injunctive relief or disputes relating to intellectual property. *Archer and White Sales, Inc. v. Henry Schein, Inc.*, 878 F.3d 488, 491 (5th Cir. 2017) (case below). *See also* Petition for a Writ of *Certiorari* at 6 (March 2018). The original action alleged violations of the antitrust laws, not intellectual property rights. The request for unspecified injunctive relief was apparently overwhelmed by a demand for money damages amounting to tens of millions of dollars. Petition for a Writ of *Certiorari* at 5-6 (March 2018). It would appear the controversy underlying the case at bar falls squarely within the ambit of the directive to arbitrate *any* dispute.

Furthermore, certain aspects of the arbitral accord described above are likely beyond question. The first is the agreement to arbitrate was arrived at by consent; it was not imposed by coercion. Second, the signatories contracted to arbitrate *any* dispute (the aforementioned exceptions aside). Third and last, no doubt the parties expected a court to honor the terms of their accord.

The "wholly groundless" theorem confounds both the terms of that arbitral pact and the parties' expectations. The doctrine sets aside the words agreed to, and imposes new terms, hitherto unknown to the

parties. The "wholly groundless" theorem reinvests a court with adjudicative power, contrary to the more limited role apparently contracted for and expected by the parties. The doctrine irrevocably alters what disputes are cognizable in arbitration, and therefore the procedures by which they will be resolved.

A final point: "any dispute" means "*any* dispute" or at least it should. Those plain words, found at the heart of the instant case, were cancelled out by lower tribunal's application of the "wholly groundless" theorem, thereby usurping the terms of the relevant contract, and frustrating the expectations of the parties.

It is respectfully submitted by this *amicus* that the "wholly groundless" theorem is contrary to the arbitration jurisprudence of this Court, including, but not limited to, the principles that arbitration is a matter of contract, contracts to arbitrate must be enforced according to their terms, and the expectations of the contracting parties are to be honored. The doctrine violates those maxims, and therefore the "wholly groundless" theorem should be overridden or at least be subject to a limiting principle.

III. THE "WHOLLY GROUNDLESS" THEOREM IS CONTRARY TO THE STRONG FEDERAL POLICY FAVORING ARBITRATION.

A long and unbroken line of this Court's arbitration landmarks informs us that, well into the opening decades of the Twentieth Century, there was widespread judicial hostility towards arbitration as an

alternative to traditional litigation. Most recently, the Court reminds that once upon a time "courts routinely refused to enforce agreements to arbitrate" or found other means to reduce their effectiveness. *Epic*, *supra*, *slip op.* at 5.

The strong federal policy validating arbitration closed that unfortunate chapter in American law. *Moses H. Cone*, *supra*, 460 U.S. at 24. *See also* Anthony Michael Sabino, "Awarding Punitive Damages in Securities Industry Arbitration: Working For A Just Result," 27 *U. of Richmond L. Rev.* 33, 34-39 (1992) (summarizing the then-extant landmarks announcing the strong federal policy favoring arbitration). Consonant with that mandate, for many decades now the Court has repeatedly and consistently put aside obstacles to the fulfillment of the robust policy favoring arbitration. *See generally Epic*, *supra*, *slip op.* at 16 ("In many cases over many years, this Court has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes.").

The "wholly groundless" theorem is untethered from the strong federal policy favoring arbitration. In contravention of the legislative mandate pronounced nearly one hundred years ago, the doctrine diverts controversies from arbitration, and redirects them to litigation. The "wholly groundless" theorem thwarts contractual terms providing for arbitration, and thereby frustrates the expectations of the parties to such arbitral accords. The net result is inapposite to the strong federal policy favoring arbitration.

It is respectfully submitted by this *amicus* that the "wholly groundless" theorem is at odds with the strong federal policy favoring arbitration, and therefore the doctrine must be erased or at least strictly cabined.

IV. THE "WHOLLY GROUNDLESS" THEOREM IS A JUDICIAL CONSTRUCT WHICH IMPERMISSIBLY FRUSTRATES ARBITRATION.

Consistently and without hesitation, the Court has, time and again, put to the side judge-made law which frustrates agreements to arbitrate. *See Concepcion*, *supra*, 563 U.S. at 340-41. In dismantling one such obstacle to arbitration, that one emanating from a state tribunal, the Court warned that judicial hostility towards arbitration "manifest[s] itself in a great variety of devices and formulas." *Id.* at 342 (quotations and citations omitted). Given that *Concepcion*'s most powerful lessons have already been well illustrated in the arguments preceding this one, there is no need to regurgitate them here.

The salient point to be made at this juncture is that the axiom announced in *Concepcion* held no ambiguity. It pronounced that whenever judicial constructs from whatever source prohibit or impede arbitration, "the analysis is straightforward: The conflicting rule is displaced by the FAA." *Id.* at 341. *Concepcion* provides the rule for decision in the case at bar, as it has in other, recent arbitration landmarks. *See*

American Express, *supra*, 570 U.S. at 238 ("Truth to tell," *Concepcion* "all but resolves" the question.).

The "wholly groundless" theorem found in the instant case is little different from the state court construct disavowed in *Concepcion*. The former suffers from the same flaws as the latter: it is antithetical to the strong federal policy favoring arbitration; it usurps the contractual terms of the parties' arbitral accord; and it defeats the parties' expectations.

Refuting the "wholly groundless" theorem extant in the case at bar is required, not merely for the present, but with a view towards the future. Even as the FAA approaches its centennial, "remnants of [a] 'litigation only' ideology occasionally crop up" in the form of judicially crafted obstacles to arbitration. Anthony M. Sabino & Michael A. Sabino, "Law of the Land: U.S. Supreme Court Upholds Arbitration Agreements, Despite State Court Resistance," 61 *Nassau Lawyer* at 3, cl. 2 (December 2011).

Small wonder, then, that near the conclusion of its last term, the Court reaffirmed its obligation to guard against "new devices" intended to confound agreements to arbitrate. *Epic*, *supra*, *slip op.* at 9, *quoted* by Michael A. Sabino & Anthony M. Sabino, "'Epic' Decision by Supreme Court Orders Arbitration, Prohibits Class Action," 259 *New York Law Journal* at 4, cl. 4 (June 6, 2018).

The instant matter is the latest test of the Court's commitment to the ideals exemplified in its arbitration jurisprudence. Negating the "wholly groundless"

theorem in the case at bar is imperative, not merely for the sake of today, but to also assure that judicial manifestations yet to be conceived cannot survive the Court's scrutiny.

It is respectfully submitted by this *amicus* that the "wholly groundless" theorem is yet another judicial construct irremediably opposed to the text of the FAA, and the strong federal policy favoring arbitration. Just as the Court nullified its predecessors, the "wholly groundless" doctrine must be set aside or at least made subject to a limiting principle.

V. THE "WHOLLY GROUNDLESS" THEOREM DEPRIVES PARTIES OF THEIR PREROGATIVE TO DELEGATE "QUESTIONS OF ARBITRABILITY" TO THE ARBITRATOR.

It is a basic tenet of the Court's arbitration jurisprudence that "questions of arbitrability" are ordinarily for a court to decide. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). Yet the Court issued a contemporaneous warning that this postulation is to be applied narrowly, and then solely to prevent the injustice of forcing arbitration upon a party that had never consented to same. *Id.* at 83-84 (cautioning that not every threshold or "gateway" controversy amounts to a "question of arbitrability").

The foregoing is offset by a rule of equal efficacy; parties to an arbitral accord "may choose *who* will resolve specific disputes." *Stolt-Nielsen*, *supra*, 559 U.S. at 683 (emphasis supplied). Accordingly, parties to an

arbitral pact enjoy the liberty of delegating questions of arbitrability to the arbitrator, provided they do so in clear and unmistakable terms. *Howsam*, *supra*, 537 U.S. at 83, *quoting AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986) (quotation omitted). *See also Rent-A-Center*, *supra*, 561 U.S. at 68-69 ("We have recognized that parties can agree to arbitrate 'gateway' questions of 'arbitrability.'").

It is not surprising that precedent allows parties to override the ostensible norm, and delegate "questions of arbitrability" to the arbitrator. For decades now, the Court has looked on with approval as parties have entrusted arbitrators with the power to decide issues arising under solemn and complex statutory schemes, such as the federal securities laws, *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 238 (1987), the Racketeer Influenced and Corrupt Organizations Act, *id.* at 242, and the federal antitrust laws. *American Express*, *supra*, 570 U.S. at 233-34. *See also Epic*, *supra*, *slip op.* at 16 (summarizing the above and additional precedents "reject[ing] efforts to conjure conflicts" between the FAA and other federal statutes). Provided it is clearly and unmistakably stated, the parties' delegation of "questions of arbitrability" to the arbitrator is indistinguishable from these other, far reaching assignments of adjudicative authority to arbitrators.

Who determines questions of arbitrability turns upon "what the parties agreed to about *that* matter." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938,

943 (1995) (emphasis in the original). *See also AT&T Technologies, Inc., supra*, 475 U.S. at 649-50 (parties may agree to submit the question of arbitrability to the arbitrator, and not a court). The primacy accorded to the choice of the parties is firmly grounded in "the fact that arbitration is simply a matter of contract," *First Options, supra*, 514 U.S. at 943, and arbitral pacts, "like other contracts, are enforced according to their terms." *Id.* at 947 (quotations and citations omitted).

In sum, the Court's arbitration jurisprudence clearly requires that the first priority is to determine what the parties agreed to with regard to who decides "questions of arbitrability." If it appears the parties delegated questions of arbitrability to the arbitrator, the next step is to assure that such delegation was expressed in clear and unmistakable terms.

The "wholly groundless" theorem is irreconcilable with the foregoing. For one, the doctrine unnecessarily superimposes itself upon existing rules which more than adequately define a cogent process for determining who answers "questions of arbitrability." Next, the "wholly groundless" theorem increases the opportunity for judicial intervention with respect to the arbitrability question, while undermining the parties' freedom to conform the arbitral process to their wishes. Lastly, the precepts discussed above sit in counterpoise. The "wholly groundless" theorem upsets that balance, tipping it toward a judge's discretion and away from the parties' choices.

It is respectfully submitted by this *amicus* that the "wholly groundless" theorem misunderstands the Court's arbitration jurisprudence regarding who determines questions of arbitrability, fails to recognize the prerogatives of parties to contractually delegate such issues to the arbitrator, and unjustifiably elevates a judge's discretion in matters of arbitrability. For these reasons, the "wholly groundless" doctrine must be set aside or at least be delimited.

CONCLUSION

Respectfully, for all the reasons set forth above, the "wholly groundless" theorem should be eradicated or at least be subjected to a limiting principle, and the question presented answered in favor of the Petitioners.

Respectfully submitted,

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